(27,337)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1919.**

## No. 582.

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GEORGE S. HAWKE, PLAINTIFF IN ERROR,

*vs.*

HARVEY C. SMITH, SECRETARY OF STATE OF OHIO.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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INDEX.



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 12, 1919.

UNITED STATES OF AMERICA,
*Supreme Court of Ohio, ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Ohio, in the City of Columbus, this 1st day of October, A. D. 1919.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
*Clerk of the Supreme Court of the State of Ohio.*

Supreme Court of Ohio.

No. 16349.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, Secretary of State of Ohio, Defendant in Error.

*Petition for Writ of Error.*

To the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and to the associate Justices of the Courts:

George S. Hawke, the plaintiff in the above entitled cause, shows by his petition to this honorable court, that in the records, proceeding and decisions in the Supreme Court of Ohio, the same being the highest Court of said state in which a decision could be had in this suit, manifest error has occurred, greatly to the damage of said George S. Hawke.

That, as appears in the record and proceedings, there was drawn in question the validity of a proposed referendum election under the Constitution of Ohio, being Article II, Section I and Section 1a as amended in 1918, said proposed referendum being on the question of approving or rejecting the action of the General Assembly of Ohio in ratifying, on January 7th, 1919, the Eighteenth Amendment to the Federal Constitution. That the plaintiff in error alleges that said provision of Ohio's Constitution, permitting a referendum on the action of the General Assembly in ratifying a Federal Amendment, is in conflict with Article V of the Constitution of the United States.

Said plaintiff in error says that in this cause on the 30th day of September, 1919, final judgment was rendered against

your petitioner by the Supreme Court of the State of Ohio, the same being the highest Court of law or equity in said State, wherein the judgment of the Court of Appeals, of Franklin County, Ohio, in denying to plaintiff in error an injunction which would prevent the defendant in error submitting said referendum to the electors of Ohio in the election to be held on November 4, 1919, was sustained and affirmed.

All of which, to the prejudice of said plaintiff in error who is a resident and tax payer of Ohio, fully appears in the records and proceedings of the case and is specifically set forth in the assignment of errors filed herewith.

Wherefore, your petitioners pray for an allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio and the Judges thereof, to the end that the record in this case may be removed into the Supreme Court of the United States, and the errors complained of by your petitioners may be examined and corrected and said judgment reversed, and said cause remanded, as provided by law; and that your petitioners may have such other and further relief in the premises as may be just; and your petitioners will ever pray.

GEORGE S. HAWKE,
WAYNE B. WHEELER,
CHAS. M. EARHART,
J. A. WHITE,
*Attorneys for Petitioner.*

*Assignment of Errors.*

Supreme Court of Ohio.

No. 16349.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, Secretary of the State of Ohio, Defendant in Error.

Assignment of Errors on Writ of Error from the Sureme Court of the United States to the Supreme Court of the State of Ohio.

Now comes George S. Hawke in connection with the petition for a writ of error herein, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Ohio in the above entitled action, there is manifest error in this, to-wit:

First. The Supreme Court of the State of Ohio erred in affirming the judgment of the Court of Appeals of Franklin County, Ohio, and in refusing to reverse said judgment and remand this cause to the Court of Appeals of Franklin County, Ohio, for further proceedings.

Second. The Supreme Court of the State of Ohio should have found that said Court of Appeals of Franklin County, Ohio, erred in sustaining the demurrer of said Harvey C. Smith, Secretary of the State of Ohio, to the petition of said George S. Hawke.

Third. The judgment of said Supreme Court of Ohio was given for said *said* Harvey C. Smith, Secretary of the State of Ohio, when it ought to be given for the said George S. Hawke.

Fourth. The judgment of the Supreme Court of the State of Ohio, in this cause is in contravention of Article V of the Constitution of the United States which provides, that amendments to the Federal Constitution shall be valid to all intents and purposes
5 when ratified by the Legislatures of three-fourths of the several states. And that the new amendment to the Ohio Constitution relating to a referendum of the electors on acts of the General Assembly in ratifying federal amendments, is unconstitutional in that it conflicts with the United States Constitution.

GEORGE S. HAWKE,
WAYNE B. WHEELER,
CHAS. M. EARHART,
J. A. WHITE,
*Attorneys for George S. Hawke.*

6 Supreme Court of Ohio.

No. 16349.

GEORGE S. HAWKE, Plaintiff,

vs.

HARVEY C. SMITH, Secretary of the State of Ohio, Defendant.

*Entry.*

On this day came the plaintiff George S. Hawke, by his attorneys herein, and present to the Court their petition praying for the allowance of a Writ of Error from the Supreme Court of the United States, and filed therewith their assignments of error.

Which said writ of error is allowed and said plaintiff is ordered to give bond to cover the costs in this action in the amount of Two Hundred dollars ($200.00).

I certify that a federal question was made in this case, viz: Whether a proposed referendum election under the Constitution of Ohio, Article II, Section I and Section 1*a*, as amended in 1918, can be had on the action of the General Assembly of the State of Ohio in ratifying on January 7, 1919, the 18th amendment to the Federal Constitution, under Article V of the United States Constitution.

Approved.

HUGH L. NICHOLS,
*Chief Justice.*

7 Supreme Court of Ohio.

No. 16349.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, Secretary of the State of Ohio, Defendant in Error.

*Writ of Error and Order of Allowance of Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the Unted States to the Honorable Judges of the Supreme Court of Ohio, Greetings:

Whereas, in the record and proceedings and in the rendition of the judgment of the above entitled cause which is now before you, or some of you, between George S. Hawke, plaintiff in error, and Harvey C. Smith, Secretary of State of Ohio, defendant in error, your court being the highest court of said State of Ohio having jurisdiction of the cause, there was drawn in question the validity of Article II, Section I and Section Ia of the Ohio Constitution, providing for a proposed referendum election on the question of approving or rejecting the action of the General Assembly of Ohio in ratifying the Eighteenth Amendment to the Federal Constitution, the question being whether or not said provisions of the Ohio Constitution are repugnant to the Constitution of the United States, and the decision is in favor of the validity of said sections of the Ohio Constitution, and whereas, there is manifest error in said judgment to the great damage of said George S. Hawke, and whereas we are willing that if there is error it should be duly corrected, we command you therefore, if judgment be given therein, that you send under seal of your court the record and proceedings in said cause to the Supreme Court of the United States together with this writ, within such time as may be necessary in order that you have the same at Washington on 6th day of October 1919, in the said Supreme Court of the United States then and there held, that the record and proceedings aforesaid may be then inspected by the Supreme Court of the United States and that said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Edward D. White, Chief Justice, of the United States, the first day of October, 1919.

[Seal United States District Court, Southern District of Ohio.]

B. E. DILLEY,
*Clerk of the District Court of the United States, Southern District of Ohio.*

Writ of error allowed upon the execution of a bond in the sum of $200.00 this first day of October, 1919.

HUGH L. NICHOLS,
*Chief Justice of the Supreme Court of Ohio.*

8 Supreme Court of Ohio.

No. 16349.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, Secretary of the State of Ohio,
Defendant in Error.

*Waiver of Citation.*

The issuance and service of a citation is hereby waived this 1st day of October, 1919.

JOHN G. PRICE, *Attorney General;*
B. W. GEARHEART, *Special Counsel,*
*Att'ys for Defendant in Error.*

9 No. 16349.

GEORGE S. HAWKE

vs.

HARVEY C. SMITH, Sec. of the State of Ohio.

*Precipe.*

You are hereby directed to transmit to the Supreme Court of the United States a full transcript of the records and proceedings in the above entitled case.

GEORGE S. HAWKE,
J. A. WHITE,
*Att'ys for Plaintiff.*

10 Supreme Court of the State of Ohio, January Term, A. D. 1919.

No. 16349.

Title.

GEORGE S. HAWKE

v.

HARVEY C. SMITH, Secretary of the State of Ohio.

Action.

Error to the Court of Appeals of Franklin County.

Attorneys for Plaintiff in Error:
George S. Hawke, Cincinnati; James A. White, Wayne B. Wheeler, Charles M. Earhart, Columbus;

Attorneys for Defendant in Error:
John G. Price, Attorney General; B. W. Gearheart, Special Counsel Attorney General; George B. Okey, T. S. Hogan, Columbus; Judson Harmon, Lawrence Maxwell, A. J. Freiberg, Cincinnati.

*Transcript of Docket Entries.*

(Minute Book No. 35, page 149.)

1919.

June 26. Petition in Error and waiver of summons filed.
June 26. Court of Appeals transcript and original papers filed.
" " Papers taken by Mr. Hawke. July 3, 1919, returned.
July 5. Printed record filed. July 8, 1919, proof of service filed.
" 18. Entry of affirmance in court of appeals received from George S. Hawke.
Aug. 21. Plaintiff's printed briefs (White, Wheeler & Earhart), filed.
Aug. 23. Plaintiff's printed briefs, (George S. Hawke) and proof of service filed. August 25, 1919, proof of service of Geo. S. Hawke's brief filed.
Sept. 20. Defendant's printed briefs and proof of service filed.
" 23. Plaintiff's printed reply briefs filed.
" 29. Brief for plaintiff (by James C. Nicholson—amicus curiæ) filed.

11 Supreme Court of Ohio.

No. 16349.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, Secretary of the State of Ohio, Defendant in Error.

Error to the Court of Appeals of Franklin County.

*Entry of Affirmance.*

(September 30, 1919.)

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Franklin County, and was argued by counsel. On consideration whereof, it is ordered, and adjudged by this court, that the judgment of the said court of appeals be, and the same is hereby affirmed; and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendants in error recover from the plaintiff in error their costs herein expended, taxed at $—.

Ordered, that a special mandate be sent to the Common Pleas Court of Franklin County, to carry this judgment into execution.

Ordered, that a copy of this entry be certified to the Clerk of the Court of Appeals of Franklin County, "for entry."

Approved.

HUGH L. NICHOLS,
*Chief Justice.*

12 Supreme Court of Ohio.

No. 16349.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, Secretary of the State of Ohio, Defendant in Error.

*Bond.*

Bond on Writ of Error from the Supreme Court of the United States to the Supreme Court of Ohio.

Know All Men by These Presents:

That we, George S. Hawke, as Principal, and the American Surety Company, as Surety, are held and firmly bound unto Harvey C.

Smith, Secretary of the State of Ohio, in the sum of $200.00 to be paid to the said obligee, and his successor in office; to the payment of which, well and truly to be made, we bind ourselves, our successors, administrators and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 5th day of March A. D. 1919.

Whereas, the above George S. Hawke, has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Ohio:

Now, therefore, the condition of this obligation is such that if the above named George S. Hawke, shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his said plea, then this obligation shall be void; otherwise to remain in full force and effect.

GEORGE W. HAWKE.
NATIONAL SURETY COMPANY,
[SEAL.] O. H. EISSINGER,
*Vice Pres.*
RALPH C. TREADWAY,
*Ass't Sec.*

13 On this 1st day of October, 1919, the above bond having been presented to me for approval ,and having examined the same and finding it in conformity to law and the orders of this Court, and sufficient in all respects, I hereby approve the same.

HUGH S. NICHOLS,
*Chief Justice of the Supreme Court of the State of Ohio.*

14 *Certificate of Lodgment.*

SUPREME COURT,
*State of Ohio, ss:*

I, Frank E. McKean, Clerk of said Court, do hereby certify that there was lodged with me as said Clerk on October 1, 1919, in the case of George S. Hawke, plaintiff in error, against Harvey C. Smith, Secretary of State of Ohio, defendant in error:

1. The original bond, a copy of which is herein set forth.

2. Two copies of the writ of error as herein set forth, one for the defendant in error and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court at my office in Columbus, Ohio, this 1st day of October, A. D. 1919.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
*Clerk Supreme Court of Ohio.*

15 Supreme Court of the State of Ohio.

No. 16349.

GEORGE S. HAWKE, Plaintiff in Error,

v.

HARVEY C. SMITH, Secretary of State of Ohio, Defendant in Error.

*Authentication of Record.*

STATE OF OHIO,
*City of Columbus, ss:*

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing petition for writ of error, assignment of errors, order allowing writ of error, writ of error, waiver of citation and entry of appearance of defendant in error and precipe as to transcript of record, are the original papers filed in this Court in the above cause; that the foregoing copy of bond is a true copy of the bond filed in said cause; that the printed copy of the record hereto attached is a true copy of the record in said cause; and that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the records of said Court.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio, this 1st day of October, A. D. 1919.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
*Clerk Supreme Court of Ohio.*

*Opinion.*

(No. 16349—Decided September 30, 1919.)

16 GEORGE S. HAWKE

v.

HARVEY C. SMITH, Secretary of State of Ohio.

Error to the Court of Appeals of Franklin County.

The plaintiff filed a petition for an injunction in the court of common pleas of Franklin county praying that the defendant as secretary of state be restrained from spending any of the public money in preparing and printing forms of ballot for the submission of a referendum to the electors of Ohio on the question of the

ratification by the Ohio legislature of the proposed amendment to the Federal Constitution prohibiting the manufacture, sale, etc., of intoxicating liquors in the United States. A referendum petition under the alleged authority of that portion of Section I, Article II, of the Constitution of Ohio, adopted November 5, 1918, was filed with the secretary of state calling for the submission to the electors of Ohio of the ratification referred to. A demurrer to the petition was sustained by the court of common pleas, judgment was entered for the defendant. This judgment was affirmed by the court of appeals of Franklin county, and this proceeding is brought to reverse the judgments in the courts below.

Mr. George S. Hawke; Mr. James A. White, Mr. Wayne
17 B. Wheeler and Mr. Charles M. Earhart, for plaintiff in error.

Mr. John G. Price, attorney general; Mr. B. W. Gearheart; Mr. George B. Okey; Mr. Judson Harmon; Mr. Lawrence Maxwell, Mr. T. S. Hogan and Mr. A. J. Freiberg, for defendant in error.

By the COURT:

In what sense did the makers of the Constitution of the United States use the words "ratification" and "legislatures" in Article V, which provides for the ratification of proposed amendments to the Constitution by the legislatures of three-fourths of the several states? In the use of the term "ratification" was a legislative act contemplated?

In Davis v. Hildebrant, 94 Ohio St., 154, the meaning of the term "legislature," as used in Section 4, Article I, of the United States Constitution was involved. That section reads: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." Here was a plain grant of power by the Federal Constitution to each of the states to pass laws on the subject referred to, subject to the reservations stated.

In the Hildebrant case we held that in the exercise of this explicit power given by the Federal Constitution to each state to make the law referred to, the term "legislature" in Section 4,
18 Article I, of the United States Constitution "comprehends the entire legislative power of the state; and, as so used, includes not only the two branches of the general assembly, but the popular will as expressed in the referendum provided for in Section 1 and 1c of Article II of the Ohio Constitution."

We held further in paragraph three of the syllabus: "Under the latter clause of Section 4, Article I of the United States Constitution, complete and plenary power over state legislation enacted thereunder rests in the federal congress, and its laws supersede all state regulations upon the same subject. Under its grant of power to 'make or alter such regulations', congress did, by its apportionment act of August 8, 1911, legislate upon the subject, by recognizing

as lawful such congressional districts as may be created in the manner provided by the laws of those states employing the constitutional referendum."

The case of Davis v. Hildebrant, supra, was affirmed by the supreme court of the United States, 241 U. S., 565. It will be observed that in that case the state in passing the redistricting law, which applied to and governed the people of the state, was engaged in the performance of a state function. The state was given the power by Article I, Section 4, of the Federal Constitution to legislate on the subject and in the performance of that state function of legislation, it was proper to invoke every part of the machinery which the state had provided for the making of its
19 laws, and the Hildebrant case conclusively determines that the referendum is an essential part of that machinery.

Now, in this case a different article of the Federal Constitution is involved. It does not involve the making of a state law to govern merely the people of a state, but it provides for the participation by the state in the making of an amendment to the national constitution, a change in the Federal law to govern all of the states. The method which Article V of the Federal Constitution provides by which the state participates in the making of the amendment to the Federal fundamental law is by ratification by the "legislatures of three-fourths of the several states" etc.

In the Hildebrant case the amendment to the state constitution which was adopted in 1912, providing for the referendum generally on legislation by the general assembly, was involved. But in November, 1918, the people adopted an amendment to the state constitution for the express purpose of providing for a referendum on amendments proposed by the congress to the Federal Constitution under Article V.

The pertinent part of that amendment is as follows: Section- 1 and 1*a* of Article II. The people also reserve to themselves the legislative power of the referendum on the action of the general assembly ratifying any proposed amendment to the constitution of the United States."

It will be observed that it was adopted for the express
20 purpose of allowing the people of the state to participate in the legislative act of ratification of proposed amendments to the Federal Constitution. By this action the people provided for the inclusion of the popular will in the legislative power of ratifying any proposed amendment to the constitution of the United States.

The functions conferred in different parts of the Federal Constitution upon the legislatures of the states are manifestly dual in their nature. For example in the election of United States Senators by the legislatures of the several states, as provided by the Federal Constitution, until the recent amendment, the legislature acted as an electing power. It was not understood to be legislative and in states in which the governor had the veto power over legislation that power did not apply in the matter of electing senators. The legislature represented the state in a manner similar to that in which the elec-

toral college represents it in the choice of President. On the other hand the power conferred upon the legislatures in Section 4 of Article I of the Federal Constitution, which confers power on the legislature of each state to prescribe the "times, places and manner of holding elections for Senators and Representatives" is purely legislative, and as already pointed out, in the exercise of that power all the legislative machinery of the state was called into action in the performance of that state legislative duty. It is true, as argued by counsel for plaintiff in error, that under Article V, the state
21 participates in an act which amends the Federal Constitution and in that sense performs a Federal function. But it does not follow that by the word "legislature" in that section a corpus designatus is meant. It participates in the making of the fundamental law and its act is legislative in character. The making of the constitution is the highest function of legislation. That being so, it follows that in the exercise of this legislative function of ratification, the makers of the Federal Constitution contemplated that all of the agencies provided by the state for legislation should be empowered to act in accordance with the provisions made by the state at the time the action on the ratification should be taken; and that the word "legislature" in Article V is used in that sense.

Judgment affirmed.

Nichols, C. J., Jones, Matthias, Johnson, Donahue and Wanamaker, JJ., concur.

22 ROBINSON, *J.*, dissenting:

I dissent from the judgment in this case for the reason that the judgment is, and must be, based upon an amendment to a state constitution and a new and strained definition of the word "legislature" expounded by a state court.

At the time of the adoption of the Federal Constitution the term "legislature" had a certain definite meaning as the representative body delegated by the electors to make laws, and was so understood and intended as used in Article V thereof. Obviously the fundamental law does not change automatically with public sentiment and public policy, but changes only when public sentiment and public policy forces an amendment thereto. No amendment has been made to Article V and I am not ready to participate in a misapplication of its plain and expressed meaning, nor to consent to an amendment to the Federal Constitution by any other process than the process therein provided.

In my opinion the judgment here elevates states above nation, devitalizes the Federal Constitution, makes it subject to as many interpretations as there are states, and destroys its uniform operation throughout the nation.

23 STATE OF OHIO,
*City of Columbus:*

Supreme Court of the State of Ohio, of the Term of January, A. D. 1919.

I, E. O. Randall, Reporter of the Supreme Court of Ohio, do hereby certify that the foregoing transcript, consisting of seven (7) pages, constitutes a full, true and correct copy of the per curiam opinion of the Supreme Court of Ohio (concurred in by Nichols, C. J., Jones, Matthias, Johnson, Donahue and Wanamaker, JJ.) and of the dissenting opinion of Judge Robinson, in the case of George S. Hawke v. Harvey C. Smith, Secretary of State of Ohio, as the originals thereof appear on file and of record in this office, as of the date of this certificate.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 2nd day of October, A. D. 1919.

[Seal the Supreme Court of the State of Ohio.]

E. O. RANDALL,
*Reporter.*

24 Supreme Court of Ohio.

No. 16349.

GEORGE S. HAWKE, Plaintiff in Error,

versus

HARVEY C. SMITH, Secretary of the State of Ohio, Defendant in Error.

Error to the Court of Appeals, Franklin County, Ohio.

RECORD.

George S. Hawke, Cincinnati, Ohio, Attorney for Plaintiff in Error.
John G. Price, Attorney General of Ohio.
B. W. Gearhart, Special Counsel.
George B. Okey, Columbus, Ohio.
Judson Harmon, Cincinnati, Ohio.
Lawrence Maxwell, Cincinnati, Ohio.
T. S. Hogan, Columbus, Ohio.
A. J. Freiberg, Cincinnati, Ohio.

Filed Jul- 5, 1919, Supreme Court of Ohio. Frank E. McKean, Clerk.

25 RECORD.

*Petition in Error.*

(Filed in Supreme Court June 26, 1919.)

Supreme Court of Ohio.

GEORGE S. HAWKE, Plaintiff in Error,

vs.

HARVEY C. SMITH, Secretary of the State of Ohio, Defendant in Error.

Plaintiff in error says that at the April Term, 1919, of the Court of Appeals of Franklin County, Ohio, to-wit, on the 26th day of June, 1919, in a certain action then pending in said court wherein George S. Hawke was plaintiff in error and said Harvey C. Smith, Secretary of State of Ohio, was defendant in error, said defendant in error, by the consideration of said Court of Appeals recovered a judgment against the plaintiff in error affirming a judgment theretofore recovered by said defendant in error against this plain-
26 tiff in error in a certain action then pending in the Court of Common Pleas of Franklin County, Ohio, wherein said plaintiff in error was plaintiff and defendant in error was defendant said judgment of said Court of Common Pleas, so affirmed by said Court of Appeals, being a judgment sustaining the demurrer of the said defendant in said court to the petition of plaintiff and dismissing said petition at plantff's costs. All of which will more fully and at large appear in the record of said action.

Plaintiff in error files herewith a duly certified transcript of the docket and journal entries in said case, together with all the original papers herein.

Plaintiff in error says that there is error in said record, judgment, and proceedings of said Court of Appeals, manifest in the record of said court and to the prejudice of plaintiff in error in the following particulars, namely:

1. The said Court of Appeals erred in rendering judgment affirming the judgment, orders and proceedings of said Common Pleas Court of Franklin County, Ohio.

2. Said Court of Appeals erred in its findings and judgment that there was no error in the judgment and proceedings in said action in said Court of Common Pleas of Franklin County, Ohio, to the prejudice of this plaintiff in error.

27 3. Said Court of Appeals erred in rendering judgment against this plaintiff in error affirming the judgment of the said Court of Common Pleas of Franklin County in sustaining the demurrer of defendant in error to the petition of plaintiff in error and in dismissing the petition of plaintiff in error at his costs.

Plaintiff in error further says that this case involves questions arising under the Constitution of the United States and of the State of Ohio, namely: Article V of the Constitution of the United States, and Article II, Sections 1 and 1a of the Constitution of Ohio and that it draws in question the validity of an authority exercised under the State of Ohio on the ground of such authority being repugnant to the Constitution of the United States.

Wherefore plaintiff in error prays that the findings and judgment of said Court of Appeals and Court of Common Pleas of Franklin County may each be reversed, and that plaintiff in error may be restored to all things he has lost by reason thereof.

G. S. HAWKE,
*Attorney for Plaintiff in Error.*

*Waiver.*

Issuance and service of summons in error in the above action is hereby waived and the appearance of defendant in error
28 entered. Dated this 26th day of June, 1919.

JOHN G. PRICE,
*Attorney General of Ohio.*
B. W. GEARHEART,
*Special Counsel,*
*Attorney for Defendant in Error.*

*Petition in Error.*

(Filed in Court of Appeals June 26, 1919.)

Plaintiff in error says that at the April Term, 1919, of the Court of Common Pleas of Franklin County, Ohio, to-wit on the twenty-sixth day of June, 1919, defendant in error recovered a judgment by the consideration of said court, against plaintiff in error, in an action then pending therein, wherein plaintiff in error was plaintiff and defendant in error was defendant, a transcript of the docket and journal entries, together with the original papers in said action are filed herewith.

There is manifest — in said record and proceedings to the prejudice of plaintiff in error in this, to-wit: Said Court of Common Pleas erred in sustaining the demurrer of defendant in error to the petition of plaintiff in error and in dismissing said petition of plaintiff at his costs.

Plaintiff in error therefore prays that said judgment of the Court of Common Pleas may be reversed and that he be restored to
29 all things he has lost by reason thereof.

G. S. HAWKE,
*Attorney for Plaintiff in Error.*

*Transcript of Docket and Journal Entries—Court of Appeals.*

1919, June 26. Petition in error filed, the issuance and service of Summons waived and appearance of Deft. entered.
1919, June 26. Transcript of Docket & Journal Entries filed.
1919, June 26. Judgment affirmed.
1919, June 26. Mandate filed.
1919, June 26. Præcipe filed.
1919, June 26. Transcript Docket & Journal Entries to Supreme Court.

*Entry of Affirmation.*

(Filed June 26, 1919.)

This cause came on to be heard upon the petition in error, the transcript of the docket and journal entries, and the original papers and pleadings from the Court of Common Pleas of Franklin County, Ohio, and was argued by counsel and submitted to the court; on consideration whereof, the court finds there is no error on the record in said proceedings and judgment.

30 It is therefore considered by the court that the judgment aforesaid be, and same is affirmed; and that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at $—. And the court being of the opinion that there was reasonable ground for proceeding in error no penalty is allowed.

It is further ordered that a special mandate be sent to the Court of Common Pleas of Franklin County, Ohio, for execution upon this judgment.

To all of which ruling and judgment of the court in affirming the aforesaid judgment of the Court of Common Pleas of Franklin County, in sustaining said demurrer and dismissing said petition of the plaintiff in error at his costs the plaintiff in error excepts.

(Duly certified.)

*Petition in Common Pleas Court.*

(Filed April 3, 1919.)

Plaintiff is a citizen and elector of the State of Ohio, and as a taxpayer and elector of the County of Hamilton he brings this action on behalf of himself and others similarly situated. The defendant is the duly elected, qualified and acting Secretary of the State of Ohio.

Plaintiff says that on March 11th, 1919, there was filed with the defendant, as Secretary of the State of Ohio, a referendum

31 petition purporting to be signed by electors of Ohio, in the following words:

Title.

"Senate Joint Resolution No. 4 adopted by the General Assembly of Ohio on January 7, 1919, is the action of the General Assembly ratifying an amendment to the Constitution of the United States of America proposed by the 65th Congress. Said amendment provides that after one year from its ratification the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is prohibited."

"Whereas, both houses of the Sixty-fifth Congress of the United States of America, at its first session, by a constitutional majority of two-thirds thereof, made the following proposition to amend the Constitution of the United States of America in the following words, to-wit:

" 'A joint resolution proposing an amendment to the Constitution of the United States.

" 'Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein.)

32 " 'That the following amendment to the Constitution be, and hereby is, proposed to the States, to become valid as a part of the Constitution when ratified by the legislatures of the several States as provided by the Constitution, namely: Article —.

" 'Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

" 'Section 2. That Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

" 'Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution within seven years from the date of the submission hereof to the States by the Congress.'

"Resolved by the Senate and House of Representatives of the State of Ohio:

"That the said proposed amendment to the Constitution of the United States of America be, and the same is hereby ratified by the General Assembly of the State of Ohio; and, further, be it

33 "Resolved, that the certified copies of this joint resolution be forwarded by the Governor of this state to the Secretary of State at Washington, and to the presiding officers of each house of the National Congress."

Plaintiff says that on January 7th, 1919, the foregoing Senate Joint Resolution No. 4, known as the Federal Prohibition amendment, was adopted by the General Assembly of Ohio, and that on January 27th, 1919, James M. Cox as Governor of Ohio, duly forwarded certified copies of said joint resolution to the Secretary of State of the United States at Washington, *and to* the presiding officers of each house of the National Congress.

That thereafter on January 29th, 1919, the ratification of the Prohibition Amendment to the Federal Constitution was proclaimed formally by Frank L. Polk, Acting Secretary of State of the United States in the following words: That Proclamation follows:

To All to Whom These Presents Shall Come, Greeting:

"Know Ye, that the Congress of the United States at the second session, Sixty-fifth Congress, begun at Washington on the third day of December in the year one thousand nine hundred and seventeen, passed a resolution in the words and figures following, to-wit:

34 "Joint resolution, proposing an amendment to the Constitution of the United States:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein). That the following amendment to the constitution be and hereby is proposed to the states, to become valid as a part of the constitution when ratified by the Legislatures of the several states as provided by the constitution.

Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within the importation thereof into or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes, is hereby prohibited.

"Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

"Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the Legislatures of the several states, as provided in the constitution, within seven years from the date of the submission hereof to the states by the Congress.

"And, further, that it appears from the official documents on file in this department that the amendment to the constitution of the United States proposed as aforesaid has been ratified by

35 the Legislatures of the states of Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

"And, further, that the states whose Legislatures have so ratified

the said proposed amendment constitute three-fourths of the whole number of states in the United States.

"Now, therefore, be it known that I, Frank L. Polk, Acting Secretary of State of the United States, by virtue and in pursuance of Section 205 of the Revised Statutes of the United States, do hereby certify that the amendment aforesaid has become valid to all intents and purposes as a part of the Constitution of the United States.

"In testimony whereof I have hereunto set my hand and caused the seal of the Department of State to be affixed.

"Done at the city of Washington this 29th day of January, in the year of our Lord, one thousand nine hundred and nineteen.

(Signed) FRANK L. POLK,
*Acting Secretary of State.*"

36 That while the aforesaid Proclamation shows that the proclamation Amendment had on January 29th, 1919, been ratified by thirty-six states, the total number of ratifying states is now forty-five. That the said prohibition amendment has become now valid to all intents and purposes as a part of the Constitution of the United States.

That said referendum petition purports to be filed under the provision of the Constitution of Ohio adopted at the General Election in November 1918, as follows: (Sec. 1 and Ia of Art. 2.)

"Be it resolved by the people of the State of Ohio: The people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.

"No such ratification shall go into effect until ninety days after it shall have been adopted by the General Assembly. When a petition signed by six percentum of the electors of the State, as is provided for a referendum petition on laws passed by the General Assembly, shall have been filed with the Secretary of State within ninety days after said ratification, by the General Assembly, ordering that such ratification be submitted to the electors of the State for their approval or rejection the Secretary of State for their approval or

37 rejection said ratification in the manner provided for the submission by referendum of a law passed by the General Assembly, and said action of the General Assembly ratifying the said amendment to the Constitution of the United States shall not go into effect until and unless approved by a majority of those voting upon the same. All the provisions of this Article on the subject of the referendum upon laws passed by the General Assembly shall apply hereto, so far as the same are applicable, except that the General Assembly may not declare its ratification of a proposed amendment to the Constitution of the United States an emergency act not subject to the referendum."

That said recently enacted provision of the Ohio Constitution is unconstitutional in that it is in conflict with the Constitution of the United States which provides in Article 5 the manner in which amendments may be made to the Federal Constitution as follows:

"The Congress, whenever two-thirds of both Houses shall deem it

necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as part of this Con-
38 stitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One Thousand Eight Hundred and Eight shall in any Manner affect the first and fourth Clauses of the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the State."

Plaintiff says that the Constitution of Ohio can not impose any limitation upon the ratification of amendments to the Constitution of the United States.

Plaintiff says that the said referendum petition now on file with the defendant is void and of no effect and can not submit any question to be decided by the electors of Ohio at the next general election.

Plaintiff says that the said referendum petition filed on March 11th, 1919, has been filed too late to change or question the action of the General Assembly of Ohio in ratifying the Federal Prohibition Amendment.

Plaintiff says that no decision of the electors of Ohio at the next election, voting under any authority of said referendum petition can change or modify the ratification resolution passed by the General Assembly on January 7th, 1919. That said Resolution was
39 on January —, 1919, duly certified as the action of Ohio by the Governor of Ohio, and forwarded by him to the legally appointed Federal authorities in Washington. That said action of the General Assembly of Ohio in ratifying, and the action of the Governor of Ohio in certifying and forwarding, and the actions of thirty-five other States in the Union in ratifying said Prohibition Amendment, were duly canvassed by the Secretary of State of the United States. The result of said canvass was on January 29th, 1919, duly and legally announced in a Proclamation which formally declared that the Federal Prohibition Amendment had become on that date valid to all intents and purposes as a part of the Constitution of the United States. That in said Proclamation it expressly appears that from the official documents on file with the Federal authorities the amendment had been ratified by the State of Ohio and also states the names of the other thirty-five states whose action was similar to that of Ohio and whose action was required to make the amendment effective.

Plaintiff says that no State can lawfully reconsider, withdraw or reject an amen-ment to the United States Constitution after it has once ratified the same and the certification has been received by the duly constituted Federal authorities and a Proclamation of
40 the Canvass made by the Federal Secretary of State to the effect that the amendment had been adopted, by the necessary three-fourths of the States.

Plaintiff says that the defendant will unless restrained by this Court, proceed to spend large sums of money out of the public funds

of the State of Ohio in preparing and having printed form of ballots for the submission of said proposal to the electors at the next general election, and in preparing, having printed and mailed to the electors of the State, arguments for and against said proposal; which said expenditure will be a waste of the public funds of the State because said election cannot decide anything upon a proposal which cannot be legally submitted and which carried would be without effect.

Plaintiff has no adequate remedy at law.

Wherefore plaintiff prays that the defendant, Harvey C. Smith, as Secretary of the State of Ohio, be enjoined from spending any money out of the public funds of the State of Ohio in preparing and having printed forms of ballott for the submission of the said referendum on said act of said General Assembly, and from spending any money out of the public funds of the State for the purpose of preparing, printing and mailing to the electors of the State arguments on said referendum proposal; and from submitting said proposal to the electors at the election to be held in November,
41 1919, and for such other relief as may be proper.

GEORGE S. HAWKE,
*Plaintiff.*

(Duly verified.)

*Demurrer to the Petition.*

(Filed May 3, 1919.)

Now comes the defendant and demurs to the petition upon the grounds following, towit:

1. The court has no jurisdiction over the subject of the action.

2. The petition does not state facts which show a cause of action.

JOHN G. PRICE,
*Attorney General.*
B. W. GEARHEART,
*Special Counsel.*

GEO. B. OKEY,
JUDSON HARMON,
LAWRENCE MAXWELL,
T. S. HOGAN,
A. J. FREIBERG,
*Of Counsel.*

*Transcript of Docket and Journal Entries—Common Pleas Court.*

1919, April 3. Petition. Affidavit & Precipe filed.
1919, April 3. Summons issued Shff. Franklin Co., O. Ret. April 14. Ans. May 3d, 1919.
42 1919, May 3. Demurrer to Pet. & Memo. filed.
1919, June 26. Demurrer sustained, Pet. dismissed at Deft's costs as per Entry.
(Entry filed June 26, 1919.)

This day this cause came on to be heard upon the demurrer of the defendant to the petition and was argued by counsel and submitted to the Court.

The Court, being fully advised, finds that said demurrer is well taken and does sustain the same, and the plaintiff not desiring to plead further, it is ordered and adjudged, that the petition herein be dismissed and defendant recover from plaintiff his costs taxed at $—.

To each and all of the above rulings, findings and judgments the plaintiff excepts.

(Duly certified.)

Endorsed on cover: File No. 27,337. Ohio Supreme Court. Term No. 582. George S. Hawke, plaintiff in error, vs. Harvey C. Smith, Secretary of State of Ohio. Filed October 23d, 1919. File No. 27,337.

# SUPREME COURT OF THE UNITED STATES,
# OCTOBER TERM, 1919.

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**No. 582.**

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George S. Hawke, Plaintiff in Error,

vs.

Harvey C. Smith, Secretary of State of Ohio.

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**In Error to the Supreme Court of Ohio.**

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## MOTION TO ADVANCE.

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The case is here upon a writ of error duly allowed by the Chief Justice of the Supreme Court of Ohio (R. 4). The fourth assignment of error (R. 3) presents the federal question:

> "Fourth. The judgment of the Supreme Court of the State of Ohio in this cause is in contravention of Article V of the Constitution of the United States which provides that amendments to the Federal Constitution shall be valid to all intents and purposes when ratified by the Legislatures of three-fourths of the several States. And that the new amendment to the Ohio Constitution relating to a referendum of

the electors on acts of the General Assembly in ratifying federal amendments, is uncontutional in that it conflicts with the United States Constitution."

The following is the provision of the Constitution of Ohio which is assailed as being repugnant to the Federal Constitution: being section 1 and 1a of article II adopted by the people in 1918 as an amendment of a constitutional provision originally adopted in 1912 providing for referendum of "laws" passed by the General Assembly.

> "Be is resolved by the people of the State of Ohio:
>
> The people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.
>
> No such ratification shall go into effect until ninety days after it shall have been adopted by the General Assembly. When a petition signed by six per centum of the electors of the State, as is provided for a referendum petition on laws passed by the General Assembly, shall have been filed with the Secretary of State within ninety days after said ratification by the General Assembly, ordering that such ratification be submitted to the electors of the State for their approval or rejection, the Secretary of State shall submit to the electors of the State for their approval or rejection said ratification in the manner provided for the submission by referendum

> of a law passed by the General Assembly, and said action of the General Assembly ratifying the said amendment to the Constitution of the United States shall not go into effect until and unless approved by a majority of those voting upon the same. All the provisions of this Article on the subject of the referendum upon laws passed by the General Assembly shall apply hereto, so far as the same are applicable, except that the General Assembly may not declare its ratification of a proposed amendment to the Constitution of the United States an emergency act not subject to the referendum."

On January 7, 1919, the General Assembly of Ohio adopted a joint resolution ratifying the Prohibition Amendment of the Constitution of the United States proposed by the Sixty-fifth Congress, and a referendum petition was duly filed with the Secretary of State of Ohio in accordance with the above quoted constitutional provision.

This suit was brought by George S. Hawke, the plaintiff in error, a tax-payer and elector, to enjoin the Secretary of State from submitting the referendum to the electors of the State at the election to be held in November, 1919, on the ground that the provision therefor in the Constitution of Ohio is repugnant to the Federal Constitution (R. 19, 20). The Court of Common Pleas sustained a demurrer to the petition and dismissed the action, and its judgment was affirmed by the Court of Appeals of Franklin County and by the Supreme Court of Ohio.

At the referendum election the action of the General Assembly of Ohio in ratifying the Federal Amendment was disapproved by the people. Ohio is nevertheless included in the proclamation issued on January 29, 1919, by Acting Secretary of State of the United States as one of the necessary thirty-six States which had ratified the Prohibition Amendment (R. 18).

The public importance of the question presented, and an early decision thereof, is the ground upon which the defendant in error makes this motion to advance, in which the plaintiff in error concurs. The motion is submitted in the hope that the case may be set for argument at as early a day after the February recess as may be convenient to the court.

Respectfully submitted,
John G. Price, Attorney General of Ohio,
B. W. Gearheart, Special Counsel,
Lawrence Maxwell, Of Counsel,
Counsel for Defendant in Error.

The plaintiff in error concurs and joins in the motion.

J. Frank Hanly,
George S. Hawke,
Arthur Hellen,
Counsel for Plaintiff in Error.

**BRIEF OF PLAINTIFF IN ERROR**

# Supreme Court of the United States

OCTOBER TERM, 1919.

**NO. 582**

GEORGE S. HAWKE,
*Plaintiff in Error,*
*v.*
HARVEY C. SMITH, AS SECRETARY OF STATE OF OHIO,
*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

**(27337)**

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GEORGE S. HAWKE,
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Washington, D. C.,
*Counsel for Plaintiff in Error.*

CHARLES B. SMITH,
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Indianapolis Commercial Print, Indpls.

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# Supreme Court of the United States

OCTOBER TERM, 1919.

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GEORGE S. HAWKE,
*Plaintiff in Error,*
*v.*
HARVEY C. SMITH,
*As Secretary of the State of Ohio,*
*Defendant in Error.*

No. 582.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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## *STATEMENT OF THE CASE.*

This case is in this Court upon a writ of error duly allowed by the Chief Justice of the Supreme Court of the State of Ohio. (R. 4.)

It is an action by the plaintiff in error, George S. Hawke, as a citizen, taxpayer and an elector of the State of Ohio, to enjoin the defendant in error, Harvey C. Smith, as Secretary of the State of Ohio, from submitting to the electors of the State of Ohio, at the election to be held in November, ~~1920~~ 1919, a referendum on the action of the General Assembly of the State of Ohio ratifying the Amendment proposed by the Sixty-fifth Congress of the United States to the Constitution of the United States providing for national prohibition now known as the Eighteenth Amendment; and from expending any money

out of the public funds of the State of Ohio in preparing and having printed forms of ballot for the submission of said referendum on said act of said General Assembly, and from spending any money out of the public funds of said State for the purpose of preparing, printing and mailing to the electors of the State arguments on said referendum proposal. (R. 16.)

The case was filed in the Court of Common Pleas in Franklin County, Ohio. (R. 16.)

The defendant demurred to the amended petition upon the ground that the facts alleged in said petition are not sufficient to constitute a cause of action and that the Court had no jurisdiction of the subject matter. (R. 21.)

The Court found that the demurrer was well taken and should be sustained. The plaintiff refusing to plead further, the case was dismissed and judgment rendered against the plaintiff for costs. (R. 22.)

A proceeding in error was taken from the Common Pleas Court of Franklin County to the Court of Appeals of said County in which Court the judgment of the Court of Common Pleas was affirmed. (R. 16.)

From this judgment the plaintiff went to the Supreme Court of the State of Ohio on a petition in error assigning as errors:

1. That the Court of Appeals erred in rendering judgment affirming the judgment of the Court of Common Pleas.

2. That the Court of Appeals erred in its judgment that there was no error in the judgment and proceedings in the Court of Common Pleas.

3. That the Court of Appeals erred in rendering judg-

ment against the plaintiff affirming the judgment of the Court of Common Pleas. (R. 14.)

The Supreme Court of the State of Ohio affirmed the judgment of said Common Pleas Court and of said Court of Appeals. (R. 8.)

Thereupon the plaintiff filed his petition praying for the allowance of a writ of error to the Supreme Court of the United States and filed therewith his assignments of error, which writ of error was duly allowed. (R. 2, 3.)

Writ for order for allowance of writ of error was duly issued by Hon. Edward D. White, Chief Justice of United States. (R. 4.)

The questions at issue in this Court arise on the judgment of the Supreme Court of Ohio affirming the judgment of the Court of Appeals of Franklin County, Ohio, and the judgment of the Common Pleas Court of said county in sustaining the demurrer of the defendant in error to the amended petition of the plaintiff in error and involve the validity of the provisions of the Ohio State Constitution permitting the holding of a referendum election by the electors of that State on the act of the General Assembly of the State of Ohio ratifying an Amendment to the Constitution of the United States duly proposed by the Congress of the United States.

The provisions of the Ohio Constitution under which the referendum election is sought, are as follows:

> "Be it resolved by the people of the State of Ohio: The people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.
>
> "No such ratification shall go into effect until ninety days after it shall have been adopted by the General Assembly. When a petition signed by six percentum of the electors of the State, as is pro-

vided for a referendum on laws passed by the General Assembly, shall have been filed with the Secretary of State within ninety days after said ratification by the General Assembly, ordering that such ratification be submitted to the electors of the State for their approval or rejection, the Secretary of State shall submit to the electors of the State for their approval or rejection said ratification in the manner provided for the submission by referendum of a law passed by the General Assembly, and said action of the General Assembly ratifying the said amendment to the Constitution of the United States shall not go into effect until and unless approved by a majority of those voting upon the same. All the provisions of this Article on the subject of the referendum upon laws passed by the General Assembly shall apply hereto, so far as the same are applicable, except that the General Assembly may not declare its ratification of a proposed amendment to the Constitution of the United States an emergency act not subject to the referendum."

Ohio Const., Art. 2, Secs. 1 and 1a.

The plaintiff in error alleges in his amended petition, filed in the Common Pleas Court of Franklin County, and here raises and urges the invalidity of the foregoing provision of the Ohio State Constitution on the ground that it is in conflict with Article V of the Constitution of the United States providing for the amendment of that instrument and which reads as follows:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Convention in three-

fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the year One Thousand Eight Hundred and Eight shall in any Manner affect the first and fourth clauses of the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

## *ERROR RELIED UPON.*

The error relied upon in this court is the action of the Supreme Court of Ohio in affirming the judgment of the Court of Appeals of Franklin County sustaining the judgment of the Court of Common Pleas of said county in sustaining the demurrer of the defendant in error to the amended petition of the plaintiff in error filed in said Court of Common Pleas and in dismissing said petition and rendering judgment against the plaintiff in error for costs.

## *POINTS OF LAW AND AUTHORITIES RELIED UPON.*

1.

The amendment of the Federal Constitution as to substance, form and manner is exclusively a Federal question and the right to participate therein is derived from and dependent upon the Federal Constitution.

a. Article V, Federal Constitution;
b. Jameson, Const. Conventions, (4th ed.), Sections 582 and 583;
c. Watson on Const., 1310;
d. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, p. 288.

2.

The Constitution of the United States provides the manner of its own amendment and the degree and manner in which the several states may participate therein.

a. Article V, Federal Constitution;
b. Jameson, Const. Conventions, (4th ed.), Sections 582 and 583;
c. Watson on Const., 1310;
d. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, p. 288.

3.

The word "legislature" as used in Article V of the Federal Constitution, means the general assembly of a state or representative law making body chosen by the people.

a. Black on Interpretation of Laws, pages 15 and 16;
b. *Walker v. City of Cincinnati*, 21 O. S., 14 (53);
c. *State ex rel., etc. v. Hildebrant*, 241 U. S. 565;
d. Art. 1, Sec. 4, Paragraph 1, Federal Constitution;
e. Art. 1, Sec. 3, Paragraphs 1 and 2, Federal Constitution;
f. Willoughby on the Constitution, p. 20, Sec. 20;
g. Art. 1, Sec. 2, Paragraph 1, Federal Constitution;
h. Art. 11, Sec. 1, Paragraph 2, Federal Constitution;

i. 17th Amendment, Federal Constitution;
j. Report of Committee of U. S. Senate on Privileges and Elections in re Contest of Charles J. Faulkner, W. Va., 1888, confirmed by Senate;
k. Recent Wisconsin Supreme Court case interpreting Sec. 3 of Art. 1, of Federal Constitution;
l. *State v. Frear*, 125 N. W., 961;
m. Art. IV, Sec. 3, Paragraph 1, Federal Constitution;
n. Art. IV, Sec. 4, Federal Constitution;
o. The Federalist.
p. Four Elliott's Debates, 2nd ed. 182, 183;
q. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, pp. 288, 289;
r. Art. 6, Federal Constitution.

4.

The history of the Constitutional Convention and a study of its debates and those of the state conventions ratifying the Federal Constitution and the general acceptance, use and understanding of the word "legislature" at the time of the formulation and adoption of the Constitution, conclusively show that the makers of the Constitution intended to delegate the power of ratification to the general assemblies or representative law making bodies of the several states composed of members elected by the people of such states.

a. Declaration of Independence;
b. Articles of Confederation;
c. Adams' Works, Vol. —, p. 508;

d. Proceedings of Constitutional Convention, 1787;

e. Madison's Journal, pp. 97, 111, 112, 199, 200, 365, 388, 410-416, 419, 421, 435 and 542;

f. *McPherson v. Blacker,* 146 U. S., 1 (28);

g. Journal Cons. Conv., pp. 92, 190, 286 and 288;

h. Elliott's Deb., Vol. 1, pp. 156, 208, 211, 217 and 262;

i. 6 A. & E. Encycl. of L., 2d Ed., p. 906, 6 (bb), n. 3;

k. Cooley on Cons. Limitations, p. —;

l. Watson on the Constitution, pp. 318, 319 and 320;

n. *City of Chicago v. Reeves,* 77 N. E., 237; 220 Ill., 274 (—);

o. *Western v. Ryan,* 97 N. W., 347; 70 Neb. 211 (218);

q. *State v. Cox,* O. L. R., Jan. 27, 1919, p. 475 of "Federal Decisions";

r. Art. IV, Sec. 3, Federal Constitution;

s. *Hollingsworth v. Va.,* 3 Dall., 378;

t. Elliott's Journal, Constitutional Convention, 145, 182, 149, 223, 230, 304 and 317;

u. Elliott's Debates, Vol. 3, pp. 49, 96, 97;

v. Four Elliott's Debates, 2nd Ed. 182, 183;

w. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, pp. 288, 289.

5.

**Ratification of an Amendment to the Federal Consti-**

tution is not a legislative act. The power of ratification is derived from Federal and not from State authority.

a. Art. 1, Sec. 4, Federal Constitution;
b. *State ex rel., etc. v. Hildebrant,* 241 U. S., 565;
c. *McPherson v. Blacker,* 146 U. S., 1;
d. Opinion Ohio Attorney General, 1917, as to meaning of "legislature" in Art. V, Federal Constitution;
e. Elliott's Debates, Vol. 4, pp. 177 and 404;
f. 65 O. L., 280; 66 O. L. 424; 103 O. L. 974;
g. 15 U. S. S. at L. 706, and 16 U. S. S. at L. 1131;
h. Mathews' Legislative and Judicial History of the 15th Amendment, p. 68;
i. Jameson, Cons. Conv., (4th Ed.), Sec. 583;
j. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, pp. 288, 289;
k. In re Opinion of Justice, 107 Atl. (ME.), 673;
l. *State ex rel Morris v. Mason,* 43 La. Ann. 590, 9 So. 776;
m. *Commonwealth ex rel. Atty. Gen. v. Grist,* 196 Pa. State 396, 46 Atl. 505;
n. *Hollingsworth v. Virginia,* 3rd Dall. (U. S.) 378;
o. Willoughby, Const., 520, 521;
p. 2nd Watson, Const. 1318.

6.

The people of a state cannot reserve the power to act in the matter of ratification of an amendment to the Federal Constitution because the states delegated all au-

thority to amend the Federal Constitution to the Federal Government and now possess no power of ratification other than such as has been re-delegated to them by the Federal Government and are limited in the exercise of any such re-delegated powers to the manner and form and the agencies designated by the Federal Government in the National Constitution. The states can not reserve what they do not possess.

a. Part of Sec. 1, Art. II, Ohio Constitution, adopted Nov. 5, 1918;
b. 10th Amendment of Federal Constitution;
c. Art. V, Federal Constitution;
d. Jameson Cons. Conv., (4th Ed.), Sec. 583;
e. Harvard Law Review, Dec., 1919;
f. In re Opinion of Justice, 107 Atl. (ME.), 673;
g. *State ex rel. Morris v. Mason,* 43 La. Ann. 590, 9 So., 776;
h. *Commonwealth ex rel. Atty. Gen. v. Grist,* 196 Pa. State 396, 46 Atl. 505;
i. *Hollingsworth v. Virginia,* 3rd Dall. (U. S.) 378;
j. Willoughby, Const. 520, 521;
k. Second Watson Const. 1318.

7.

Under the Constitution, Congress alone may choose the mode of ratification and is empowered "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

a. U. S. Constitution, Art. V.;

b. U. S. Constitution, Sections 8 and 18, Art. I;
c. Thayer, Legal Essays, 7-13;
d. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, p. 290.

8.

Congress has acted in the matter of determining the manner of deciding the fact of ratification of amendments to the Constitution and has designated the agency for such determination. Clothed with the sole power of such action and having acted by the enactment of a statute providing the manner of ascertainment and designating the authority for deciding the fact of ratification, its action is conclusive on the states and upon the courts.

a. Third Stat. at large, 439;
b. Revised Statutes, Sec. 205;
c. U. S. Comp. Stat., Sec. 903;
d. Wambaugh, Cases on Const. Law, 26, notes 1 and 2;
e. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, p. 290.

9.

In the ratification of the amendment at bar, the authority designated by Congress, pursuing the manner of ascertainment of the fact of ratification provided for by Congress, has declared such fact, and by proclamation duly made included the State of Ohio in the list of ratifying states. And the Congress has not only acquiesced, but has approved the ascertainment of the fact of ratification and its proclamation, by affirmative action in the

enactment of the Volsted Act for the amendment's enforcement, and its action is not the subject of judicial review.

a. 40 U. S. Stat. at large, 1941;
b. Proclamation, U. S. Sec. of State, Jan. 29, 1919;
c. Legal Tender Cases, 110 U. S. 421;
d. Prize Cases, 2nd Black, (U. S.) 635;
e. *Oetjen v. Central Leather Co.*, 246 U. S. 297;
f. *Ricaud v. American Metal Co.*, 246 U. S. 304;
g. *Jones v. United States*, 137 U. S. 202;
h. *Foster v. Nielson*, 2nd Pet. (U. S.) 253;
i. *In re Cooper*, 143 U. S. 472, 499;
j. *The James G. Swan*, 50 Federal 108;
k. *Miles v. Bradford*, 2nd Md. 170;
l. *Lyons v. Woods*, 153 U. S. 649;
m. *State v. Septon*, 3rd R. I. 119;
n. *People v. Harlan*, 133 California 16;
o. *Cox v. Pitt County*, 146 North Carolina 584, 60 S. E. 516;
p. Harvard Law Review, Dec., 1919, Vol. 33, No. 2, p. 291.

10.

Executive and Congressional construction covering a century and a third of history, has conclusively established the meaning of the word "Legislatures" in Article V of the Constitution to be the general assemblies of the several states—the law making bodies of such states composed of individual members representative of, and elected by, the people of such respective states.

a. Wambaugh, Cases on Const. Law 26, notes 1 and 2;
b. Jameson, Const. Conventions, (4th Ed.), Sections 582, 583;
c. 2nd Watson Const., 1314, 1315;
d. 40 Stat. at Large, 1941;
e. Proclamation of U. S. Sec. of State, Jan. 29, 1919, and like proclamations proclaiming the ratification of former amendments.

11.

The Federal Constitution is the supreme law of the land, and as such, the courts are bound to support it. Any provision in a state constitution in conflict with or in contravention of the Federal Constitution is void.

a. Art. VI, Federal Constitution;
b. *Hauenstein v. Lybham,* (1879), 100 U. S. 483; 25 U. S. (L. Ed.), 628;
c. *Montgomery v. State,* (1908), 55 Fla. 97, 45 So., 879;
d. Minority opinions of court in recent Washington case similar to present case;
e. Jameson, Cons., Conv., 4th Ed., Sec. 583;
f. *State ex rel. Schrader v. Polley, etc.,* 26 S. D., 5;
g. *State ex rel. Davis v. Hildebrant,* 94 O. S. 154, 241 U. S. 565;
h. Art. 1, Sec. 4, Federal Constitution;
i. *State ex rel. Case v. Howell, etc.,* 85 Was. 281 and 294;
j. Amendment XXXI of Art. IV, Maine Constitution;
k. Art. V, Federal Constitution;

l. *Hollingsworth v. Va.*, 3 Dall., 378;
m. *State v. Dahl*, (N. D.), 34 L. R. A., 97;
n. Preamble, Federal Constitution;
o. *Chisholm v. State*, 2 Dall., 419;
p. *Martin v. Hunter's Lease*, 1 Wheat., 304, 325;
q. 4 Elliott Deb., 176, 177;
r. *Dodge v. Woolsey*, 18 How., 331, 348;
s. Watson on Const., Vol. 2, pp. 1310 and 1315;
t. *Moulton v. Soully*, 111 Maine, 438, 446;
u. *Horbring v. Brown*, 180 Pac. Rep., 328;
v. U. S. Rev. Stat., Sec.. 205;
w. Appendix, Part 2, U. S. Stat., 3rd Session, 65th Congress, 1918, 1919.

12.

Injunction against the calling of a referendum election on the act of the Legislature of a state ratifying an amendment to the Federal Constitution is a proper remedy and may be invoked by a citizen who is a taxpayer and an elector.

a. *State v. Superior Court*, 92 Was., 16, 159 Pac. Rep., 92;
b. *State v. Alcott*, 62 Oreg., 277, 125 Pac. Rep., 303;
c. *Rickey v. Williams*, 8 Was., 479, 36 Pac. Rep., 480;
d. *Krieachel v. Com.*, 12 Was. 428;
e. *State v. Roach*, 230 Mo., 408;
f. *Crawford v. Gilchrist*, 64 Fla., 41, 59 So. 964;

g. *State v. White,* 36 Nev., 334, 136 Pac. Rep., 110;

h. *Spear v. People,* 52 Col., 325, 122 Pac. Rep., 768;

i. Professor Dodd on Division and Amendment of State Constitutions, p. 232;

j. *Ellingham v. Dye,* 172 Ind., 336;

k. *State v. Hall,* 35 N. Dak., 34, 159 N. W., 281;

l. *Mayer v. Hughes,* 36 S. E., 247, 110 Ga., 804;

m. *De Kalb v. Atlanta,* 65 S. E., 72, 132 Ga., 727;

n. *Tolbert v. Long,* 67 S. E., 826, 134 Ga., 292;

o. *Lynchburg, etc., R. Co. v. Com.,* 109 N. C. 159;

p. *Hood v. Sutton,* 94 S. E., 686;

q. *International Trading Stamp Co. v. Memphis,* 101 Tenn., 181, 47 Southwest, 136;

r. *Layton v. Mayer,* 23 South, 99;

s. *Brown v. Trousdale,* 138 U. S., 389, 11 Sup. Court, 308.

*ARGUMENT.*

**1. Authority to Amend the Federal Constitution is Federal and not State.**

There is but one authority, by or under which, an amendment to the Federal Constitution can be made. That authority is Federal, and not state. It is found in Article V of the Federal Constitution. In it alone—within these lines and not elsewhere:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing amendments; which, in either case, shall be valid, to all intents and purposes, as a part of this Constitution when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress: Provided, That no amendment, which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the Ninth Section of the first Article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

Eighteen amendments have been made to the Constitution since its adoption—a period of one hundred and thirty-one years—~~another, the one at bar, has been proposed and is now pending~~—all originating in the Congress by resolution, adopted by a two-thirds vote of both branches, House and Senate, submitted to the "Legislatures of the several States," and ratified by the "Legislatures of three-fourths of the several States."

~~The Amendment at bar—the Suffrage Amendment—is in process of adoption by the same procedure.~~

In every instance the States have acted by and through their Legislatures or General Assemblies—bodies composed of members elected by, and representative of, the people, and usually, though not exclusively, by joint resolutions passed by each House of the several Assemblies and certified without executive signature or approval. This has been the procedure and form for one hundred and thirty-one years during which there have been established eighteen precedents without an exception or a break in the line. No attempt at Amendment has ever been made in any other or different form or manner, ~~either the amendment at bar and the one immediately preceding it~~ until the Eighteenth, or Prohibition Amendment, and then only by a few states where it is claimed the act of ratification is not complete with the action of the General Assembly until its act of approval is confirmed by referendum election by the state's qualified electors.

Among the States challenging the right of the Legislature to ratify in conformity with the provisions of Article V of the Constitution and with the precedents of a century and a third, is the State of Ohio, where by an amendment to the State Constitution adopted in November, 1918, it provided:

> Be it resolved by the people of the State of Ohio: The people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.
>
> No such ratification shall go into effect until ninety days after it shall have been adopted by the General Assembly. When a petition signed by six percentum of the electors of the State, as is provided by a referendum petition on laws

> passed by the General Assembly, shall have been filed with the Secretary of State within ninety days after said ratification of the General Assembly, ordering that such ratification be submitted to the electors of the states for their approval or rejection, in the manner provided for the submission by referendum of a law passed by the General Assembly, and said action of the General Assembly ratifying the said amendment to the Constitution of the United States shall not go into effect until and unless approved by a majority of those voting upon the same. All the provisions of the Article on the subject of the referendum upon laws passed by the General Assembly shall apply thereto, as far as the same are applicable, except that the General Assembly may not declare its ratification of a proposed amendment to the Constitution of the United States an emergency and not subject to the referendum.

Here, we submit, is an attempt by a State and its people to reserve to itself a power which they do not possess. Upon admission into the Union, the State of Ohio and its people parted with their legal sovereignty in the matter of making amendments to the Federal Constitution and shifted that sovereignty to the people of the United States, or, as has been said more exactly, to "the States' Government as forming one aggregate body represented by three-fourths of the several States at any time belonging to the Union."

As suggested in the Harvard Law Review for December, 1919, hereinbefore cited, "Article V itself accomplished this shift of sovereign power, and by its provisions the Constitution may be amended in spite of the unanimous vote of the people of any one state, and an amendment proposed by the unanimous vote of the people in one state can not become 'The Supreme Law' of that state un-

less it be approved by sufficient sister states to total three-fourths of the then existing states."

But notwithstanding this fact, the people of Ohio, by the referendum provision in their Constitution, are attempting to reserve to themselves the power to arrest and set aside the process of ratification provided by the Constitution—a power with which they parted the day they entered the Union and do not now possess—not having it, they can not reserve it.

It is an instance where a State in its Constitution declares that no ratification by the General Assembly "shall go into effect until ninety days after it shall have been adopted by the General Assembly" while the Constitution of the United States in effect declares that ratification shall be effective, so far as Ohio is concerned, the moment affirmative action by the Legislature is taken and that the moment three-fourths of the Legislatures of the several States have taken like action the Amendment "shall be valid, to all intents and purposes," that is, shall be effective, so effectually effective that the State, neither through the action of its legislature nor otherwise, can recall its act.

They are suspending the act of ratification of their State Legislature not only for ninety days, but where a referendum petition is filed within ninety days, "until and unless" such act of ratification is "approved by a majority of those voting" in the referendum election, whereas the Constitution of the United States makes ratification effective, "to all intents and purposes," upon ratification "by the Legislatures of three-fourths of the several States."

If, in the present instance, the Legislature of Ohio were the thirty-sixth Legislature ratifying the amendment at bar, the Constitution of the United States and the laws

enacted by the Congress of the United States in the exercise of a power unquestionably lodged in it would declare the amendment "ratified to all intents and purposes," but the referendum clause in the Ohio Constitution would suspend ratification not only in Ohio, but throughout the Union, for a period of ninety days, notwithstanding the National Constitution and the laws of Congress. A small per cent. of the people of Ohio—six per cent.—by the filing of a petition with the Secretary of State for a referendum election on the action of ratification by the State Legislature would suspend ratification and the taking effect of the amendment "until and unless" such act of ratification was "approved by a majority of those (the electors of Ohio) voting in the referendum election."

The letter and the spirit of the Constitution and the precedents of a century and a third are against the attempt, but that they may be justified and bring their act within the grant of ratifying power expressed in Article V of the Constitution, they insist upon a strained and forced construction of the letter of that great Instrument, claiming for the word "Legislature" as used therein a meaning utterly foreign to the context, to the unbroken legislative and executive precedents of interpretation and to the mind and thought of the men who formulated the Constitution and the Convention that adopted it. They interpret the word to mean "the law-making power" of each state, amending, by interpretation, the Constitutional letter to read, "when ratified by the law-making power of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress." The interpellation of the words the "law-making power" instead of the

Legislatures, of three-fourths of the States in the context of the Constitutional provision, discloses of itself such an incongruity as to preclude its acceptance. It convicts the framers of the Constitution of delegating the power of ratification in one instance, not to an entity of well-defined character—a body composed of delegates or members—but to a vote of the proletariat, and in the next instance, and in the same sentence, of delegating such power of ratification to a convention composed of delegates or members—a convention without any legislative power whatever. Such inconsistency and diversions of thought and purpose cannot, we think, be justly imputed to minds like those who framed and adopted this great National pact.

In this clause in the Ohio constitution, the power to ratify amendments, granted directly by the National Constitution, is to be taken away from the Legislature, or at least made subject to revocation by a plebiscite. If permitted, it will amount to a nullification of the provisions of the Constitution and destroy its integrity. It is unthinkable that a single state may reserve power delegated by the whole people to the Federal Government when the Constitution was formed. Neither the people of the State nor those of the Nation have ever had the right to participate directly in the matter of ratification of a Federal Constitutional Amendment. It is important in this behalf to remember that the authority to ratify, redelegated by the National Government, is not bestowed upon the State or upon the people of the State, but upon the Legislature—a known and recognized agency or entity. Justices Parker and Mitchell, in the dissenting opinion in the Oregon case, *State v. Howell, supra*, put it well:

> It is therefore plain that the above quoted portion of the Fifth Article of the Federal Constitu-

> tion is the supreme law of the land, touching the subject of amending that instrument. The several States, by the expressed provisions of that Article, have as completely surrendered the power to prescribe a different manner of amending the Federal Constitution as they have surrendered to the Federal Government the sovereign powers enumerated in that instrument to be exercised by the Federal Government * * *.
>
> I am convinced that the ratification by the State Legislature of a proposed amendment to the Federal Constitution is an exercise of a power which the Legislature possesses by virtue of the Fifth Article of that instrument, and that designation by Congress of the method of ratification in pursuance of the power given to Congress by that Article, and that the Legislature is not acting in pursuance of that power given it by the State Constitution, except in so far as the Legislature may owe its existence to the State Constitution.

In Jameson, Constitutional Conventions (4th Ed.), Sec. 583, it is said:

> The power of a state legislature to participate in amending the Federal Constitution exists only by virtue of a special grant in that constitution. It is a power it could not assume under any notion of a general right to legislate, for that right is confined to state limits, and to the enactment of ordinary laws.

The Supreme Court of Maine, in an advisory opinion handed down at the request of the Governor, in *In re Opinion of Justices,* 107 Atl., 673, declares:

> The people through their constitution might have clothed the senate alone, or the house alone, or the governor's council or the governor with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote. But they did not. They retained no power of ratification in themselves but conferred it completely upon the two houses of the legislature, that is the legislative assembly. * * *

> It admits of no doubt that in the matter of amendment, which is governed by Article V, the people divested themselves of all authority and conferred the power of proposal upon Congress or upon a national constitutional convention, and the power of ratification upon the state legislature or upon state constitutional conventions.

In volume 2, p. 1310, of Watson's Constitutional Law, it is said:

> Whether an amendment is proposed by Congress or by a convention, it is ratified or rejected by the representatives of the people either in the legislature, or in convention, and not by the people voting on it directly. The people have no direct power either to propose an amendment or to ratify it after it is proposed and submitted.

The Maine court held in the opinion cited above that the people of the State of Maine had completely and unreservedly lodged their power over amendments with the bodies designated in Article V, and had no power left in themselves either to propose or to ratify federal amendments, declaring, "the authority is elsewhere."

The weight of authority in behalf of the contention we make is overwhelming; indeed, with the exception of the Washington case, *State v. Howell, supra*, there are no other or adverse precedents.

**2. The history of Article V, and the use and understanding of the word "Legislature" at the time of the formulation and adoption of the Federal Constitution, utterly preclude the "legislative power" interpretation or theory.**

The history of the times, of Article V, and of the Constitution Convention and its debates, and those of the state conventions called to ratify the Constitution, and the

general understanding of the meaning of the word "legislature" and the use that was then made of it, conclusively show that by the use of the word in Article V the framers of the Constitution intended to delegate the power of ratification of amendments to the general assemblies of the respective states—their representative law-making bodies composed of delegates or members elected by the people.

Immediately after the Declaration of Independence, the Continental Congress passed a resolution recommending that each of the thirteen states adopt a state constitution suitable to its own needs. In pursuance of that resolution the state of Virginia adopted a state constitution, early in 1776, in which it was declared:

> We ordain and declare the future form of government to be as follows: The legislative, the executive, and the judiciary departments shall be separate and distinct. The legislature shall be formed of two distinct branches, which together shall be a complete legislature.

In that there was no room for the referendum, or for the "legislative power" theory of a legislature plus the body of the electors.

The next year a constitutional convention sat in New York and framed a constitution, written by John Jay, the first Chief Justice of this high Court, and the foremost lawyer of his time, in which it was provided:

> This convention, in the name and by the authority of the good people of this State, ordain and determine and declare, that the supreme legislative power within this State shall be vested in two separate and distinct bodies of men who together shall form the Legislature.

During the Revolutionary period every other of the thirteen states, except two—Rhode Island and Connecticut—

formulated and adopted similar state Constitutions, and the two that did not do so, did not, only because they already had similar bodies under their charters.

Because of these years of debate and constitution making, the word legislature had come to have a fixed and definite meaning among statesmen and public men and by the public itself. It meant an assembly of two houses whose members were elected by the people and were their delegates or representatives. It meant that, and only that. There was no thought of a legislature constituted of an assembly plus the people.

If there had been no debates in the Constitutional Convention, or in the conventions called to ratify the Constitution, on the subject at all, the meaning of the word in the minds of the framers of the Constitution and their understanding of the entity they were designating in Article V as the ratifying agency of the several states, would have been convincingly apparent. But there were debates both in the Constitutional convention and in the ratifying conventions, and these debates make the matter conclusively clear. There is no ambiguity, uncertainty or doubt.

Take first the history of Article V in its progress through the Convention from its first introduction until it finally found its place in the Constitution in its completed form.

It first appeared in the resolutions offered by Edmund Randolph, May 29, 1787, and read as follows:

> 12. Resolved, That provision ought to be made for the amendment of the articles of Union, whensoever it shall seem necessary; and that assent of the national legislature ought not to be required thereto.
>
> Elliott's Journal, 145.

On June 19th, the Committee of the whole house re-

ported the Randolph resolutions as altered, amended and agreed to in the committee, with the following provision as to amendment:

> 17. Resolved, That provision ought to be made for the amendment of the articles of union whensoever it shall seem necessary.
>
> Elliott's Journal, 182.

On May 29th, Charles Pinckney presented a draft of a federal government, the Sixteenth Article of which provided:

> If two-thirds of the legislatures of the states apply for the same, the legislature of the United States shall call a convention for the purpose of amending the constitution. Or should Congress, with the consent of two-thirds of each house, propose to the states amendments to the same, the agreement of two-thirds of the legislatures of the states shall be sufficient to make the said amendments parts of the constitution.
>
> Elliott's Journal, 149.

On July 26th, the resolutions of the convention were referred to a committee of detail composed of Messrs. Rutledge, Randolph, Gorham, Ellsworth and Wilson, for the purpose of reporting a constitution, the Nineteenth Article of which reads:

> Resolved, That provision ought to be made for the amendment of the articles of union whensoever it shall seem necessary.
>
> Elliott's Journal, 223.

On August 6th, the Committee of Detail reported a draft of the constitution, the Nineteenth Article of which provided:

> On the application of the legislatures of two-thirds of the states in the Union for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose.
>
> Elliott's Journal, 230.

Subsequently, a Committee of Revision was appointed and the tentative draft was referred to it. On September 12th, the Committee reported a revised draft in which appeared the following:

> Art. V. The Congress, whenever two-thirds of both houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid, to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths, at least, of the legislatures of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the —— and —— sections of article ——.
>
> Elliott's Journal, 304.

On September 15th, Art. V was amended and given its present form, to-wit:

> The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the 1st and 4th clauses in the 9th section of the 1st article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.
>
> Elliott's Journal, 317.

Immediately thereafter, the question to agree to the Constitution as amended was put and carried in the affirmative, all the States concurring, and the instrument was engrossed.

This history of the evolution of the amendatory clause, is of itself convincing evidence that those who formulated it had in mind the designation of a ratifying agency in each of the several states definite and well understood—a state assembly or representative body, to be, as Congress might determine, the legislature or law-making body of the state, according to the meaning of the word "legislature" as then understood and accepted, or a special delegated body to be known as a convention.

Take next the debates in the conventions, national and state:

The national Convention met on May 14th, 1787. On May 29, as we have already seen, Edmund Randolph, a delegate from Virginia and the Governor of that state, laid before the Convention certain resolutions, one of which, the fifteenth, was as follows:

> That the amendments which shall be offered to the confederation by the convention ought at the proper time, or times, after the approbation of congress, to be submitted to an assembly or assemblies of representatives, to be expressly chosen by the people to consider and decide thereon.

The resolution proposed by Mr. Randolph was considered by the convention on June 5. (Madison's Journal 111, 112.):

> Mr. Sherman thought such a popular ratification unnecessary; the articles of confederation providing for changes and alterations, with the assent of congress, and ratification of state legislatures.
>
> Mr. King supposed that the last articles of confederation rendered the legislature competent to

> the ratification. The people of the Southern states, where the Federal articles had been ratified by the legislatures only, had since, impliedly given their sanction to it. He thought, notwithstanding, that there might be policy in varying the mode, a convention being a single house, the adoption may more easily be carried through it, than through the legislatures, where there are several branches. The legislatures, also, being to lose power, will be most likely to raise objections. *The people having already parted with the necessary powers,* it is immaterial to them by which government they are possessed provided they be well employed. (Italics ours.)

Again, on June 20, Mr. Ellsworth of Connecticut observed (Madison's Journal, 199-200):

> He wished also, the plan of the convention to go forth as an amendment of the articles of the confederation, since under this idea the authority of the legislatures could ratify it. If they were unwilling, the people will be so too. If the plan goes forth to the people for ratification, several succeeding conventions within the states would be unavoidable. He did not like these conventions that were better fitted to pull down than to build up constitutions.
>
> Mr. Randolph did not object to the change of expression, but apprised the gentlemen who wished for it, that he did not admit it for the reasons assigned; particularly that of getting rid of reference to the people for ratifications.

Apparently, Mr. Ellsworth was not yet satisfied with the idea of ratifying the new constitution by convention, for upon June 23rd he moved that it be referred to the legislatures of the states for ratification.

We quote from Mr. Madison's Journal again (pp. 410-416):

> Colonel Mason considered a reference of the plan to the authority of the people as one of the

most important and essential of the resolutions. *The legislatures have no power to ratify it. They are the mere creatures of the state constitutions,* and cannot be greater than their creators. And he knew of no power in any of the constitutions —he knew there was no power in some of them —that could be competent to this object. Whither, then, must we resort? To the people with whom all power remains that has not been given up in the constitutions derived from them. It was of great moment, he observed, that this doctrine should be cherished, as the basis of free government. Another strong reason was, that *admitting the legislatures to have a competent authority, it would be wrong to refer the plan to them, because succeeding legislatures, having equal authority, could undo the acts* of their predecessors; and the National government would stand in each state on the weak and tottering foundation of an act of assembly. There was a remaining consideration, of some weight. In some of the states the governments were not derived from the clear and undisputed authority of the people. This was the case in Virginia. Some of the best and wisest citizens considered the constitution as established by an assumed authority. A National constitution derived from such a source would be exposed to the severest criticism. (Italics ours.)

Mr. Randolph. One idea has pervaded all our proceedings, to-wit, that opposition as well from the states as from individuals will be made to the system to be proposed. Will it not then be highly imprudent to furnish any unnecessary pretext, by the mode of ratifying it? Added to other objections against a ratification by the legislative authority only, it may be remarked, that there have been instances in which the authority of the common law has been set up in particular states against that of the confederation, which has had no higher sanction than legislative ratification. Whose opposition will be most likely to be excited against the system? That of the local demagogues

who will be degraded by it, from the importance they now hold. These will spare no efforts to impede that progress in the popular mind, which will be necessary to the adoption of the plan and which every member will find to have taken place in his own, if he will compare his own, if he will compare his present opinions with those he brought with him into the convention. It is of great importance, therefore, that the consideration of this subject should be transferred from the legislatures, where this class of men have their full influence, to a field in which their efforts can be less mischievous. It is, moreover, worthy of consideration, that some of the states are averse to any change in their constitution, and will not take the requisite steps, unless expressly called upon, to refer the question to the people.

Mr. Gerry. The arguments of Col. Mason and Mr. Randolph prove too much. They prove an unconstitutionality in the present Federal system, and even in some of the state governments. * * * Both the State government and the Federal government have been too long acquiesced in to be now shaken. He considered the federation to be paramount to any state constitution. The last article of it, authorizing alterations, must consequently be so as well as the others; and everything done in pursuance of the article must have the same high authority with the article. Great confusion, he was confident, would result from a recurrence to the people. They would never agree on anything. He could not see any ground to suppose that the people will do what their rulers will not. The rulers will either conform to, or influence the sense of, the people.

Mr. Gorman was against referring the plan to the legislatures. 1. Men chosen by the people for the particular purpose will discuss the subject more candidly than members of the legislature who are to lose power which is to be given up to the general government. 2. Some of the legislatures are composed of several branches. It will be

more difficult in these cases to get the plan through the legislatures, than through a convention. 3. In the states many of the ablest men are excluded from the legislature, but may be elected to a convention. 4. The legislatures will be interrupted with a variety of little business; by artfully pressing which, designing men will find means to delay from year to year, if not to frustrate altogether, the national system. 5. If the last article of the confederation is to be pursued, the unanimous concurrence of the states will be necessary. * * * It would, therefore, deserve serious consideration, whether provision ought not to be made for giving effect to the system, without waiting for the unanimous concurrence of the states.

Mr. Ellsworth. If there be only legislatures who should find themselves incompetent to the ratification, he should be content to let them advise with their constituents and pursue such a mode as would be competent. He thought more was to be expected from the legislatures, than from the people. * * * It was said by Colonel Mason—in the first place, that the legislatures have no authority in this case; and in the second, that their successors, having equal authority, could rescind their acts. As to the second point he could not admit it to be well founded. *An act to which the states by their legislatures made themselves parties becomes a compact from which no one of the parties can recede of itself.* As to the first point, he observed that a new set of ideas seemed to have crept in since the articles of confederation were established. Conventions of the people or with power derived from the people were not then thought of. The legislatures were considered as competent. Their ratification has been acquiesced in without complaint. *To whom have Congress applied on subsequent occasions for further powers? To the legislatures, not to the people.* The fact is, that we exist at present (and we need not inquire how) as a Federal society united by a charter, one article of which is that alterations therein may be made by the legis-

lative authority of the states. It has been said that if the confederation is to be observed, the states must unanimously concur in the proposed innovations. He would answer, that if such were the urgency and necessity of our situation as to warrant a new compact among a part of the states, founded on the consent of the people; the same pleas would be equally valid, in favor of a partial compact, founded on the consent of the legislatures. (Italics ours.)

Mr. Williamson thought the resolution (the nineteenth) so expressed, as that it might be submitted either to the legislatures or to conventions recommended by the legislatures. He observed that some legislatures were evidently authorized to ratify the system. He thought, too, that conventions were to be preferred, as more likely to be composed of the ablest men in the states.

Mr. Gouverneur Morris considered the inference of Mr. Ellsworth from the plea of necessity, as applied to the establishment of a new system, on the consent of the people of a part of the states, in favor of a like establishment, on the consent of a part of the legislatures, as a *non-sequitur*. If the confederation is to be pursued, no alteration can be made without the unanimous consent of the legislatures. Legislative alterations not conformable to the Federal compact would clearly not be valid. The judges would consider them as null and void. Whereas, in case of an appeal to the people of the United States, the supreme authority, the Federal compact may be altered by a majority of them, in like manner as the constitution of a particular state may be altered by a majority of the people of the state. The amendment moved by Mr. Ellsworth erroneously supposed that we are proceeding on the basis of the confederation. This convention is unknown to the confederation. (Italics ours.)

Mr. King thought with Mr. Ellsworth that the legislatures had competent authority, the acquiescence of the people of America in the confederation being equivalent to a formal ratification by

the people. He thought with Mr. Ellsworth, also that the plea of necessity was as valid in this case as the other. At the same time, he preferred a reference to the authority of the people expressly delegated to conventions, as the most certain means of obviating all disputes and doubts concerning the legitimacy of the new constitution, as well as the most likely means of drawing forth the best men in the states to decide on it. He remarked that among other objections made in the state of New York in granting powers to Congress, one had been that such powers as would operate within the states could not be reconciled to the constitution, and, therefore, were not grantable by the legislative authority. He considered it as of some consequence, also, to get rid of the scruples which some members of the state legislatures might derive from their oaths to support and maintain the existing constitutions.

Mr. Madison thought it clear that the legislatures were incompetent to the proposed changes. These changes would make essential inroads in the state constitutions; and it would be novel and dangerous doctrine that a legislature could change the constitution under which it held its existence. There might indeed be some constitutions within the Union which had given a power to the legislature to concur in alterations of the Federal compact. But there were certainly some which had not; and in the case of these, a ratification must of necessity be obtained from the people He considered the difference between a system founded on the legislatures only, and one founded on the people to be the true difference between a league or treaty and a constitution. The former, in point of moral obligation, might be as inviolable as the latter. In point of political operation, there were two important distinctions in favor of the latter. First a law violating a treaty ratified by pre-existing law might be respected by the judges as a law though an unwise or perfidious one. A law violating a constitution established by the people them-

selves, would be considered by the judge as null and void. Secondly, the doctrine laid down by the law of nations in the case of treaties is, that a breach of any one article by any of the parties frees the other parties from their engagements. In the case of a union of people under one constitution, the nature of the pact has always been understood to exclude such an interpretation. Comparing the two modes, in point of expediency, he thought all the considerations which recommended this convention, in preference to congress, for proposing the reform, *were in favor of state conventions, in preference to the legislatures,* for examining and adopting it. (Italics ours.)

And again, upon August 31, we find that Mr. L. Martin insisted *on a reference to the state legislatures. He urged the danger of commotions from a resort to the people and to first principles* in which a government might be on one side, and the people on the other. He was apprehensive of no such consequences, however, in Maryland, whether the legislature or the people should be appealed to. Both of them would be generally against the constitution. Madison's Journal, p. 542. (Italics ours.)

Mr. Stillman, a delegate in the Massachusetts convention, in a general review of the constitution said:

> All the offices in Congress are elective, not hereditary. The President and senators are to be chosen by the interposition of the legislatures of the several states, who are the representatives and guardians of the people, whose honor and interest will aid them in all probability to have good men placed in the general government.
>
> Elliott's Debates, Vol. 2, p. 166.

In the New York Convention, Mr. Smith said:

> With respect to the second part of the amendment, I would observe, that, as the senators are the representatives of the state legislatures, it is reasonable and proper that they should be under their control.
>
> Elliott's Debates, Vol. 2, p. 311.

In the same Convention, Mr. Hamilton made this utterance:

> Sir, the most powerful obstacle to the members of Congress betraying the interest of their constituents, is the state legislatures themselves, who will be standing bodies of observation, possessing the confidence of the people, jealous of federal encroachments, and armed with every power to check the first essay of treachery.

Elliott's Debates, Vol. 2, p. 266.

Mr. Dana in the Massachusetts Convention said:

> If they were recommended to be adopted by this Convention, it was very probable that two-thirds of the Congress would concur in proposing them; or that two-thirds of the legislatures of the several states would apply for the call of a convention to consider them, agreeably to the mode pointed out in the Constitution.

Elliott's Debates, Vol. 2, p. 138.

Mr. Iredell in the North Carolina Convention made clear his concept of what was meant by the term "legislatures":

> By referring this business to the legislatures, expense would be saved, and in general, it may be presumed they would speak the genuine sense of the people. It may, however, on some occasions be better to consult an immediate delegation for that special purpose. This is, therefore, left discretionary. It is highly probable that amendments agreed to in either of these methods would be conducive to the public welfare, when so large a majority of the states consented to them.

Elliott's Debates, Vol. 4, p. 177.

In the Virginia Convention, Patrick Henry was equally clear as to his understanding of what was meant by the word "Legislature":

> Two-thirds of the Congress, or of the state leg-

> islatures, are necessary even to propose amendments. If one-third of these be unworthy men, they may prevent the application for amendments; but what is destructive and mischievous, is, that three-fourths of the state legislatures, or of the state conventions, must concur in the amendments when proposed. In such numerous bodies, there must necessarily be some designing, bad men. To suppose that so large a number as three-fourths of the states will concur, is to suppose that they will possess genius, intelligence, and integrity, approaching to miraculous.
>
> Elliott's Debates, Vol. 3, p. 49.

Throughout the sittings of the Conventions, the resolutions offered and considered, and the debates upon them, whether in their first or final forms, the word "legislature" was used with like meaning whether applied to state assembly or the National Congress, distinguished only by the use of "state" or "national" before the word, as the object desired to be expressed required. Both state legislatures, with one or two exceptions and these not greatly variant, and the National Legislature, were, in the thought of these men, representative law-making bodies.

These papers and these debates, whether in the Constitutional Convention itself or in the state ratifying conventions, lead the mind irresistibly to that concept and interpretation of the term. If that was the understanding of the word by those who framed the Constitution and those who adopted it, and they so used it, then that is what it now means. We must continue to give it the meaning its framers and ratifiers intended it should have. What it meant to them, it must continue to mean to us.

Dred Scott Case, 19th R. 393.

**3. Long and unvaried construction of the word "Legislatures" used in Article V, by the executive and legislative departments of the government, have conclusively established the meaning of the term.**

Executive and legislative construction covering a century and a third of history, has conclusively established the meaning of the word "Legislatures" in Article V of the Constitution to be the general assemblies of the several states—their law-making bodies composed of representatives elected by the people—and exclude the "legislative power" interpretation.

Such construction, long continued and unvaried and acquiesced in, by other departments of the government, public officials and the people, if not absolutely binding upon this Court, is entitled to grave consideration and should be given great weight when the Court is called upon to examine and declare the meaning of the instrument or clause involved.

Willoughby on the Constitution, p. 20, sec. 20.

The term legislature, in either its singular or plural form, appears thirteen times and in ten different connections in the constitution with reference to state legislatures.

Article 1, Section 2, paragraph 1; Section 3, paragraph 1; Section 4, paragraph 1; Section 8, paragraph 17.

Article 2, section 1, paragraph 2.

Article 4, section 3, paragraph 1; section 4 (twice).

Article 5 (twice).

Article 6, paragraph 3.

Amendments 14, paragraph 2; 16, 17, paragraph 1, 2 (twice).

It cannot be claimed that the word is used in all these ten connections in the same sense; there are instances

in which it is perhaps used with the "legislative power" meaning contended for by the referendum advocates, as in section 4, Article 1, which reads:

> The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof.

We do not concede that it is so used in the clause just quoted, but granting it is, it does but accentuate the certainty that it is not so used in Article 5.

The grant of the power in Section 4 of the first Article is a legislative grant giving to the law-making power of a state full authority to prescribe by a law, duly enacted, the times, places and manner of holding elections for senators and representatives.

The majority opinion in the Washington case, *State v. Howell, supra*, is founded in argument and in authority upon that contention and based upon *State ex rel. Schrader v. Polley*, 26 S. D. 5, and *State ex rel Davis v. Hildebrant*, 94 Ohio St. 154, and *State ex rel. Davis v. Hildebrant*, 241 U. S. 565.

Granting for the purpose of the present argument that the interpretation given the use of the word in Article 1 by the Dakota and Ohio courts and by this Court is correct, the cases are easily distinguishable from the case at bar and the meaning of the word "Legislatures," as used in the fifth Article.

The distinction is made with clearness and accuracy by Judges Parker and Mitchell in their dissenting opinion in the Howell case:

> The question in each of those cases was as to whether or not an act passed by the representative legislative law-making body of the state, called "legislature" in South Dakota and "general assembly" in Ohio, dividing the state into congressional districts, and providing for the election of

representatives in congress therefrom, was subject to a referendum vote of the people of the state under the initiative and referendum provision of its constitution; those courts deciding that such an act was subject to a referendum vote of the people. It seems to me at once apparent that there is a marked distinction between the legislative power reserved to the several states by the provisions of section 4, article 1, of the federal constitution, and the provisions of article 5 of that instrument, providing the manner in which the respective states and the people shall express their ratification of proposed amendments to that instrument. The former is the enactment of law, the prescribing of a rule of conduct by the sovereign legislative power of the state, subject, of course, to be superseded by laws which may be enacted by congress, but nevertheless within itself an act of legislation, completed or to be completed by the sole legislative power of the state; and the fact that such legislation may have to give way to some higher law which congress may enact, does not in the least change the fact that it is an act done by the legislative power of the state, in the doing of which no other state or power has any voice whatever. The latter is but the casting of the vote of the state and its people upon the question of amending the federal constitution, in the manner provided for by the terms of that instrument; a question not of state legislation, but of national legislation, in which each state has but one vote. I think that the South Dakota and Ohio decisions are of no controlling force in the solution of this problem.

In section 1, of Article 2, we have the following:

> Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors.

Can it be held with any degree of fairness of interpretation that a referendum could be held by a state upon the manner of appointing presidential electors?

Is it not clear that the framers of the constitution intended that the term "legislature" in this instance should mean a representative body of men who make the laws of the state?

Section 3 of Article 1 of the constitution provides:

> The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Can it be contended that the framers of this section had in mind, when they provided for the election of United States senators by the "legislatures" of the several states, the "legislative power" of the states? Is it not clear that the intention was to designate a representative or delegated body?

The latter meaning and intention were so obvious that no one contended or even believed a United States senator could be elected by any other body than the state legislature, or that its power to elect could be impaired by the state or shared with the people through a plebiscite—so obvious, indeed, that the congress by more than a two-thirds vote proposed and submitted an amendment to the Constitution, to the legislatures of the several states for their ratification, divesting legislatures of their power to elect senators and vesting it in the people of the respective states.

This we submit is a high legislative interpretation of the meaning of the word as it appears in the third section of Article 1, where the connection in which it is used is identical with that in which it is used in Article 5.

Here is another congressional interpretation, which, we think, has value in this connection.

In 1887, the State of West Virginia had a constitutional

provision prohibiting the legislature from transacting, or entering upon, any business when in special session other than that set out in the proclamation of the Governor convening it.

There was a vacancy in the State's representation in the Senate of the United States.

The Governor waited to submit notice of the vacancy, until the legislature adjourned, and then appointed Mr. Daniel B. Lucas to fill the vacancy. Later he convened the legislature in special session, limiting in his proclamation the business of the session to eight distinct propositions enumerated therein. The election of a United States Senator was not mentioned in the proclamation. When the legislature convened in special session, it proceeded to elect Charles J. Faulkner to fill the vacancy in the Senate. A contest arose in the Senate of the United States as to which of the two men—Mr. Daniel B. Lucas, the Governor's appointee, or Mr. Charles J. Faulkner, the choice of the legislature—should be seated.

The Senate was then Republican and a majority of the committee on Privileges and Elections was composed of Republicans. On this committee were many distinguished Senators and some of them eminent lawyers—Hoar of Massachusetts, Fry of Maine, Teller of Colorado, Evarts of New York, Spooner of Wisconsin, Saulsbury of Delaware, Vance of North Carolina, Pugh of Alabama, and Ustes of Louisiana.

The committee reported, seating Mr. Faulkner and excluding Mr. Lucas. The action of the committee was affirmed by the Senate. In its report, the committee said:

> The Constitution of the United States is the supreme authority, and all provisions of the constitution or statutes of any state are void and of

> no effect unless they can be so construed as not to conflict with its provisions. * * *
>
> But it seems to the committee that the construction of the State Constitution of West Virginia, upon which the above argument is based, is one which will not bear examination. When that constitution provided that the legislature so convened in extraordinary occasions should enter upon no business except that stated in the proclamation by which it was called together, the people must be presumed to have had in mind business to be transacted under authority of the State Constitution, and not to have intended to prohibit the performance of duties imposed upon it by the supreme authority of the Constitution of the United States. * * *
>
> But we are of the opinion that no state can prescribe any qualification to the office of United States senator in addition to those declared in the Constitution of the United States.

Here again, we have a clear case of legislative interpretation in accord with our contention of the meaning of the word "legislature" as used in the Fifth Article and opposed to the "legislative power" contention.

In Section Three of Art. IV, there is a provision that no state shall be "formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress."

Can it be contended that a state, by any individual action of its own, could impair the power of the legislatures of two consolidating states and the Congress of the United States to consent to a consolidation by providing that the consent of the legislatures, or of either of them, to such consolidation should be invalid until submitted to a plebiscite?

And is not the connection and meaning of the word

"legislatures" as used in this Article, identical with the connection and meaning of the word as used in Art. V? The thing required of the legislature in each article, is consent and not legislation.

In Section Four of Art. IV of the Constitution, it is provided:

> The United States shall guarantee to every state in the Union, a republican form of government, and shall protect each of them against invasion and, on application of the Legislature, or of the executive (when the Legislature cannot be convened), against domestic violence.

Can it be contended that a state, by adding a referendum clause to its constitution, could forbid the application of the legislature, or, if the legislature could not be convened, the application of the governer, to the United States for protection against domestic violence until a plebiscite could be held and such action authorized?

Was any thought like that in the minds of the men who framed this section? And, is not the word used in similar connection and with like meaning in Art. V as it is used in this section of the Fourth Article?

Does it not come with such cogency as to coerce con viction, considered in the light of history; precedent; interpretation, legislative and executive, and the context and connection in which the word "legislatures" is used in Art. V, that it was the intention of the fathers who formed, fashioned and adopted Art. V, to invest the complete power as to ratifying an amendment to the Constitution, in the legislature as a representative body and not in the intangible something called "legislative power"? and to so vest it to the exclusion of any direct participation by the people, except through the election of members of the legislature?

We know it is argued:

> That here, of all places, should the people be accurately heard when a change in their constitution is involved; that to interpret narrowly the word "Legislature" in Art. V will create a danger of unseemly conflicts between outside, direct expressions of popular will, and the official expression conveyed through the people's representatives; and that in interpreting a constitution, presumption should always favor whatever construction will best effect the end of all governments—the orderly welfare of their people.

But is that argument to outbalance the weight of the letter itself? the intention of the framers of the Constitution? and of the conventions that have adopted it? and the weight of one hundred and thirty-one years of unbroken precedent?

Is it not inconceivable that the power of determining the validity of ratification was meant to be vested in any one state, or anywhere but "in the Government of the United States"? The question goes, it seems to us, to the very heart of the National pact. Its life is dependent upon the answer, not immediately, perhaps, but eventually. It was well said by a citizen of my state, now dead, and formerly President of the United States, that the length of a step is not of so much concern as the direction of the step.

Interpretation of the Constitution is a judicial function. The Courts, however, may not make a new constitution. They may interpret the one that is. But even here, they may not be a "law unto themselves." There are rules of construction which bind them and which they must follow—even this high Court—rules made and established by you and your great predecessors for the court's guidance, and which we need but to suggest to have considered and followed.

The construction given must be a reasonable construc-

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Interpretation of the Constitution is a judicial function. The Courts, however, may not make a new constitution. They may interpret the one that is. But even here, they may not be a "law unto themselves." There are rules of construction which bind them and which they must follow—even this high Court—rules made and established by you and your great predecessors for the court's guidance, and which we need but to suggest to have considered and followed.

The construction given must be a reasonable construc-

tion. Every clause must have a reasonable interpretation and held to express the intentions of the framers.

*Woodson v. Murdock,* 72 Wall. 351.

The Federal Constitution, like every other grant, is to have a reasonable construction according to the import of its terms.

*Martin v. Hunter,* 1st Wheat. 304, 326;
*Pollock v. Farmers,* 158 United States 601, 618, 619.

The Constitution and laws of the United States are construed as all other instruments granting power or property.

*Rhode Island v. Mass.,* 12 Pet. 657, 723;
*Brown v. Maryland,* 12 Wheat. 419, 437;
*U. S. v. Arredonds,* 6 Pet. 691, 738, 740.

In the construction of the Constitution, the words, the subjects, the context, and the intentions of the persons using them are all to be taken into view.

*U. S. v. Arredonds,* 6 Pet. 691, 738, 740;
*Rhode Island v. Mass.,* 12 Pet. 657, 721, 723;
*Pollock v. Farmers,* 158 United States, 601, 618, 619.

These rules applied to the case at bar lead our minds with irresistible force to the conclusion that the term "legislatures" as used in Article V of the Constitution, vests the power to ratify an amendment to the Constitution in the general assemblies of the respective states and not in whatever "law making power" the vagaries of the various states may lead them to establish.

**4. Ratification of an Amendment to the Constitution Is Not a Legislative Act. It Is Not a Law-making Function.**

The Supreme Court of Ohio in the case at bar, and the Supreme Court of Washington in *State v. Howell, supra,*

each by a divided opinion, held the ratification of an amendment to be a law-making function. It seems clear to us, on reason, that it is not, and the great weight of authority holds that it is not. The act lacks the essential elements of law-making. As we have elsewhere pointed out in this brief, the power to ratify is not derived from the state at all, but from the Federal government through the national constitution. The legislature, therefore, takes the power into its absolute possession, unlimited, unaffected and indivisible by anything the state or its people may do. This fact alone strips it of every characteristic of state legislative action or power.

Ratification does not require the enactment of a law, the passage of a concurrent, or even a joint, resolution of the legislature; it could be done by a simple motion in each House and the action certified to the Secretary of State at Washington. It does not require the signature of the Governor; it does not even have to be submitted to him.

If it were a state legislative act, it would require submission to the Governor and his signature, either in approval, or in disapproval through a veto, in every state in the Union. If it required the exercise of the law-making power of a state, it would require the Governor's participation, for through his right to recommend legislation and to approve the same when enacted, and his power to veto it if he disapprove, the Governor is a very substantial element of the law-making power.

We are aware of the argument in the opinion of both the Ohio and the Washington courts that ratification is a high legislative function, but the argument is not con-

vincing. Ratification by a state enacts no law in and of itself; it but registers the state's assent through its legislature as the agency selected by the government of the United States for that purpose, to a proposal made by the Congress for an amendment to the Constitution. It is simply the state's "aye" uttered through its legislature when its name is called. It could quite as well be uttered by the Governor had he been designated by the Constitution as the ratifying agent, or by the Secretary of State, so far as legality is concerned.

Ratification is but one of the three steps in the making of an amendment now required by the Constitution. The first step is the submission of a proposal for an amendment by a two-thirds vote of Congress, then follow thirty-six partial steps, constituting all togeher a single step in the process—ratification or assent thereto by the legislatures of three-fourths of the several states—no one of which of itself constitutes a complete step. It can not become complete or effective without the concurrent action of the legislatures of thirty-five other states. It is the theory of the Constitution and of the very genius of our institutions, that the making of the National Constitution was the act, not of separate and disassociated sovereign peoples but of one people. The covenant is not "we, the states," but "we, the people"; not "we, the people of the State of Ohio," but "we, the people of the United States do ordain and establish this Constitution for the United States of America."

The legislatures of the several states are simply the agencies representing the people of the several states, selected by the Government of the United States through

which, and by whose act of ratification, the Government at Washington ascertains the fact that the people of the United States—all the people—not of one state, but of three-fourths of the states, ordain and establish a change in the Nation's organic law. These legislatures speak for their respective peoples not as distinct and separate peoples, but as certain designated parts of "we, the people of the United States."

The third and final step in the making of an amendment, is the ascertainment by the duly selected agency of the United States Government, of the fact that at least thirty-six ratifying agencies have ratified the amendment, and having ascertained the fact, the proclamation of it.

A state legislative power is capable of the full and complete exercise of every legislative function without let or hindrance from, or by, any outside power or agent. The legislative power of a state, whether it be vested in a legislature of the government of the state, or in the legislature of the government plus the people of the state, or the electors of the state, has within itself the ability to function with completeness and effect.

It can make a law, complete, full fledged, and effective —a living vital thing. This fact alone distinguishes that power from the ratifying function devolved upon the legislative agency selected by the Federal Constitution. The legislative power of a state comes from within, springs out of the inherent power of its people—the ratifying authority of the legislature of a state comes from without—a thing delegated by the Government of the United States, representative of all the people, through a National Constitution. Neither the state nor its people conferred the ratifying power and, never having conferred

it, neither it nor its people can withdraw it. The power was conferred by another and greater sovereignty and can only be withdrawn or limited in its exercise by the power that conferred it.

The legislative power of a state may not only enact legislation, it may repeal it, or amend it, at will; but the legislature of a state cannot change by the crossing of a t or the dotting of an i a proposal for a constitutional amendment to the Federal Constitution submitted to it by the Congress of the United States for ratification. It must accept it or let it alone. It can only vote, either "aye" or "nay."

### Legislature Cannot Rescind Its Ratification.

Having once ratified, it cannot recall its action, for in the act of ratification it exhausts its power. Having proclaimed its "aye" and recorded its vote, its function is ended. In Watson Const., Vol. 2, 1316, is the following statement, which we believe to be accepted law:

> It is interesting to note in this connection, as an historical fact demonstrating the attitude of the Federal Government, that according to their admitted and accepted practice, if a state legislature has once ratified a federal amendment a subsequent legislature has no power to rescind such ratification. Such rescission was attempted by Ohio and New Jersey with reference to the fourteenth amendment, and by New York with reference to the fifteenth, but the proclamation of the secretary of state for the United States was issued announcing the final adoption of the amendments as a part of the Federal Constitution, notwithstanding the attempted rescission by subsequen legislatures. The attempted rescission was ignored.

Commenting upon this fact, the Supreme Court of Maine, *in re* Opinion, *supra*, puts it well:

> If a subsequent legislature cannot rescind the ratification by a former legislature, it would seem that much less could such ratification be rescinded by the subsequent vote of the people, especially in view of the fact that the people have unreservedly surrendered all authority over that subject matter.

If the ratifying agency designated by the Constitution, at a time when it represents the complete law-making power of the state, save that shared by the Governor, cannot recall its act of ratification—and as we have just seen, it cannot—how can it be said that the people, upon whom the Constitution devolves no power to ratify, may recall the act of ratification. It seems to us there is but one answer: "There is no way under Heaven or among men, save by armed revolution—the power of might arrayed in battle."

### Legislative Power Limited.

Again, we quote from the dissenting opinion of Judges Parker and Mitchell in the case of *State v. Howell, supra*. Speaking of the decisions in *Schrader v. Polley* and *Davis v. Hildebrant, supra*, relied upon by the majority of the Washington Court, they say, as we have already seen:

> The question in each of those cases was as to whether or not an act passed by the representative legislative law-making body of the state, called "legislature" in South Dakota, and "general assembly" in Ohio, dividing the state into congressional districts, and providing for the election of representatives in Congress therefrom, was subject to a referendum vote of the people of the state under the initiative and referendum provi-

> sion of its Constitution; those courts deciding that such an act was subject to a referendum vote of the people. It seems to me at once apparent that there is a marked distinction between the legislative power reserved to the several states by the provisions of Section 4, Article 1, of the Federal Constitution, and the provisions of Article 5, of that instrument, providing the manner in which the respective states and the people shall express their ratification of proposed amendments to that instrument. The former is the enactment of law, the prescribing of a rule of conduct, by the sovereign legislative power of the state, subject, of course, to be superseded by laws which may be enacted by congress, but nevertheless within itself an act of legislation, completed or to be completed by the sole legislative power of the state; and the fact that such legislation may have to give way to some higher law which congress may enact does not in the least change the fact that it is an act done by the legislative power of the state, in the doing of which no other state or power has any voice whatsoever. The latter is but the casting of the vote of the state and its people upon the question of amending the Federal Constitution, in the manner provided for by the terms of that instrument; a question not of state legislation, but of national legislation, in which each state has but one vote. I think that the South Dakota and Ohio decisions are of no controlling force in the solution of this problem.

It has been held that the proposing of a constitution, or amendments to an existing one, is not the exercise of legislative power vested in the General Assembly of the state by a general grant, such as that contained in the following clause, found, either in exact form or substance in most American state constitutions:

> The legislative authority of the state shall be vested in the General Assembly.

Such power must be granted by a constitutional pro-

vision specifically authorizing the proposal of amendments.

*Chicago v. Reeves,* 220 Ill. 274; 77 N. E. 237-9-240;

*Livermore v. Waite,* 102 Calif. 113; 36 Pac. 426, 25 L. R. A. 312;

*Warfield v. Vandiver,* 101 Md. 78; 60 Atl. 538-540-542;

*Commonwealth v. Griest,* 196 Pa. 396; 46 Atl. 505; 50 L. R. A. O. S. 568;

*Koehler v. Hill,* 15 N. W. 609;

*Morris v. Mason,* 9 So. 776;

In re Senate File, No. 31, 41 N. W. 981, 25 Neb. 864;

*Hatch v. Stoneman,* 66 Calif. 632; 6 Pac. 734;

*Oakland Paving Co. v. Hilton,* 69 Calif. 479; 11 Pac. 3;

*Edwards v. Lesueur,* 132 Mo. 410; 33 S. W. 1130;

*Holmberg v. Jones,* 65 Pac. 563 (Idaho);

*In re Denny,* 165 Ind. 104;

*Van Horn v. Dorrance,* 2 Del. 304;

Cooley's Constitutional Limitations, (7th Ed.) 126;

Jameson Constitutional Conventions, (4th (Ed.), 84, 359, 211, 388, 550, 600, *et seq.;*

*Evansville v. State,* 118 Ind. 426;

*Yancy v. Hyde,* 121 Ind. 26;

*Ellingham v. Dye,* 178 Ind. 336 at 343-348-357-361-380.

In the case of the *City of Chicago v. Reeves,* just cited, he Illinois Supreme Court said:

The right to propose amendments to the consti-

# CARD 2

> tution is not the exercise of legislative power by the General Assembly in its ordinary sense, but such power is vested in the Legislature only by the grant found in the constitution, and such power must be exercised within the terms of the grant.

In *Livermore v. Waite, supra,* it was held:

> The Legislature is not in the exercise of its legislative power, or of any sovereignty of the people that has been intrusted to it, but is merely acting under a limited power, conferred upon it by the people, and which might with equal propriety have been conferred upon either house or upon the Governor, or upon a special commission, or upon any other body or tribunal.

In *Commonwealth v. Griest, supra,* the Supreme Court of Pennsylvania said:

> It is not law-making power, which is a distinct and separate function, but it is a specific exercise of the power of the people to make its constitution.

Judge Jameson says, on page 578, as to whether proposing amendments is fundamental or ordinary legislation:

> When the legislative action consists simply in affirming, by a resolution intended only as a step preparatory to further and other action either of that or of some other body, the expediency of amending the constitution, or in merely proposing such amendments as it deems desirable, such action cannot properly be called legislative.

The question decided in these cases is closely analogous to the question here under discussion. If the act of proposing an amendment to a state constitution is not a legislative act in the ordinary sense of the term, how can it be said that the act of ratification of an amendment to the Federal Constitution by a state legislature is a

legislative act? The principle involved is the same with the additional fact that the power of ratification in the case of a national amendment comes from the national government and not from the state, which adds substantial and controlling weight to the proposition that ratification is not a legislative act.

As herein before suggested, ratifying resolutions are not required to be submitted to the Governor of a state for his signature or even his consideration. In re Senate File 31, reported in 25 Neb., page 864, the Supreme Court of that state said:

> It will be conceded that under our constitution it is unnecessary to submit a proposition to amend the constitution, duly passed by each branch of the legislature, to the governor for his approval, as such proposition is not ordinary legislation.

The Supreme Court of California in *Hatch v. Stoneman,* 66 California 632, on page 634, held:

> The proposal of the amendment or amendments is not by the legislature, as such, in the ordinary enactment of a law, and with the proposal the Governor has nothing to do.

In *Warfield v. Vandiver,* 60 Atl., page 538, the Supreme Court of Maryland held that the proposal to amend the constitution was not legislation and hence the bill proposing constitutional amendments was not required to be submitted to the Governor for any action. The same is true of a ratifying resolution.

Certainly it cannot be said in the face of these authorities, or on reason, that the act of ratification of a Federal amendment by a state legislature is a legislative act done in the exercise of a state's law-making power. If this cannot be said, then the referendum clause in the

Ohio constitution by which ratification of Federal amendments by the legislature is suspended, cannot be sustained.

**5. Congress alone under the Constitution has power to ascertain and proclaim the fact of ratification and to designate an agency to make such ascertainment and proclamation. In the exercise of that power it has determined the manner of ascertainment of the fact of ratification and of its proclamation, and its determination thereof is final and conclusive.**

Congress alone may choose the mode of ratification within the limits of the discretion permitted it in Article V; that is, it may select, as the ratifying agencies, either the legislatures of the several states or conventions. Within this limitation it has exclusive power.

The constitution does not designate a body to determine when such amendments have been ratified, or the validity of the acts of ratification. But Congress may choose the mode of ratificaion, and in paragraph 18, Section 8 of Article I, of the Constitution, it is empowered:

> To make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States or in any Department or Officer thereof.

The power here conferred authorizes the Congress to make a law "to carry into execution" the ratification provisions of Article V.

Acting under that authority, Congress has passed a law in the matter providing:

> That, whenever official notice shall have been received at the Department of State that any Amendment proposed to the Constitution of the United States has been adopted according to the provisions of the Constitution, it shall be the duty of the Secretary of State forthwith to cause the said Amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the states by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

Stat. at Large 439; RS. Section 205; U. S. Comp. Stat., Section 303.

The above statute was enacted April 20, 1818. Prior to its enactment, the first ten amendments had been communicated to Congress by the President, and the eleventh had been declared adopted by the President in a message to Congress, while the twelfth was declared adopted by the Secretary of State by proclamation.

Wambaugh, Cases on Constitutional Law 26, Note 1;

Wambaugh, Cases on Constitutional Law 27, Notes 1 and 2.

After the Act of 1818, Secretary Seward referred to Congress ratifications made of doubtful validity by subsequent rejections, and Congress by resolution declared the amendment adopted.

Jameson Constitutional Convention, (4th Ed.) pages 582, 583;

**Watson Const. 1314 and 1315.**

The Congress, being clothed with the authority to choose the mode of ratification and to enact a law for the

execution of the act of ratification, according to the mode selected by it, and having by law selected the agency and the manner of ascertaining the fact of ratification and clothed the agency so selected with authority to proclaim the fact of ratification, naming in its certificate the states that have adopted the amendment, and proclaiming the fact of ratification and the validity of the act thereof, no other agency or power can declare the ratification by any state to be invalid.

The State of Ohio, therefore, had no power to provide in its constitution for a referendum on the act of ratification by its legislature or to suspend the taking effect of such act or to make it invalid, as it attempts to do, "until and unless" such act of ratification shall be confirmed by a vote of the majority of the electors of Ohio in a referendum plebiscite.

The action of Congress in enacting such a law and in designating the Secretary of State as the authority to ascertain the fact of ratification and to proclaim the adoption and the validity of the amendment, according as the information and the facts shall be found by him, is conclusive as against all other agencies.

Constitution making is a political question and inheres in the political departments of the Government of the United States—the legislative and executive departments—and where the legislative department has designated an agency to ascertain and proclaim the fact of ratification, the courts, to avoid conflict, refrain from any act looking to the overthrow of the decision and action of such department.

Legal Tender Cases, 110 United States 421;
Prize Cases, 2nd Black, (U. S.) 635;

*Oetjen v. Central Leather Co.*, 246 United States 297;
*Ricaud v. American Metal Co.*, 246 United States 304;
*Jones v. United States*, 137 U. S. 202;
*Foster v. Neilson*, 2 Pet. (U. S.) 253;
*In re Cooper*, 143 United States 472;
*The James G. Swann*, 50 Federal 108;
*Miles v. Bradford*, 22 Maryland 170;
*Luther v. Borden*, 7 How. (U. S.) 1, 39;
*Pacific States, etc., Co. v. State of Oregon*, 223 U. S. 118.

We call the attention of the Court to the following state of facts:

The amendment under discussion was ratified by the Ohio Legislature January 7, 1919. (R. 18.)

A certified copy of the Ohio Resolution of Ratification was filed with the Secretary of State of the United States, January 29, 1919. (R. 18.)

Proclamation declaring ratification and the amendment to be in effect "to all intents and purposes as a part of the Constitution of the United States," issued January 29, 1919, in which proclamation the State of Ohio was included as one of the thirty-six states having ratified the Amendment. (R. 18.)

The referendum petition on the action of ratification by the Ohio legislature was filed March 11, 1919. (R. 20.)

The above facts conclusively disclose this ultimate and controlling fact:

The ratification of the Eighteenth Amendment to the Constitution was not only fully accomplished by the Ohio

Legislature and the action duly certified to the Secretary of State of the United States before the referendum petition under consideration was filed with the Secretary of State of Ohio, but ratification of the Amendment throughout the Union had occurred, as well; and the fact of such ratification had been duly ascertained and proclaimed by the Secretary of State of the United States, declaring the amendment in effect "to all intents and purposes as a part of the Constitution of the United States."

Constitution making and the making of constitutional amendments are political acts; their recognition and control inhere in the political departments of the government of the United States—the legislative and executive departments—and where the legislative department has designated an agency to ascertain and proclaim the fact of the ratification of an amendment to the federal constitution, the courts, to avoid conflict, refrain from any act looking to the overthrow of the decision and action of that department.

Legal Tender Cases, 110 United States 421;
Prize Cases, 2nd Black, (U. S.) 635;
*Oetjen v. Central Leather Co.,* 246 United States 297;
*Ricaud v. American Metal Co.,* 246 United States 304;
*Jones v. United States,* 137 U. S. 202;
*Foster v. Nielson,* 2 Pet., (U. S.) 253;
*In re Cooper,* 143 United States 472;
*The James G. Swann,* 50 Federal 108;
*Miles v. Bradford,* 22 Maryland 170;
*Luther v. Borden,* 7 How., (U. S.), 39;
*Pacific States, etc., Co. v. State of Oregon,* 223 U. S. 118.

Congress and the executive department are clothed with full political power. It is their province, under the law and the Constitution, to ascertain and determine the fact of the ratification of an amendment to the federal constitution. Being clothed with this authority—authority to choose the mode of ratification and to enact a law for the execution of the act of ratification, according to the mode selected by it—and having by law selected the agency and manner of ascertaining the fact of ratification—the Secretary of State of the United States—and clothed the agency so selected with authority to proclaim the fact of ratification, naming in his certificate the states that have adopted the amendment, and proclaiming the fact of ratification and the validity of the act thereof, and that agency—the Secretary of State of the United States—having ascertained the fact and proclaimed the ratification of the amendment at bar—including the State of Ohio among the states that had ratified—in form and manner as by federal law provided, no other agency or power can declare the ratification to be invalid, either as a whole or as to any state.

The action of Congress in making such a law and in designating the Secretary of State as the authority to ascertain the fact of ratification and proclaim the adoption and the validity of the amendment, according as the information and the facts are found by him, and the ascertainment by the Secretary of State of the fact of ratification and his proclamation thereof, including in such proclamation the state of Ohio, is conclusive as against the state of Ohio and all other agencies.

The State of Ohio, therefore, had no right to suspend or invalidate the action of the Ohio State Legislature in ratifying the Amendment, or to suspend or defer the

taking effect of the Amendment. As we have already seen, the legislature was without power to recall its ratification, and even though the word "legislature," as used in Article 5 of the Federal Constitution, should be construed to mean the "law-making power" instead of the law-making body—a thing we do not for an instant admit—its power as to the ratification of the amendment at bar was exhausted before the referendum petition was filed—exhausted the moment the legislature passed the Resolution of Ratification, and certainly so at the time the Resolution was certified by the Governor of Ohio and filed with the Secretary of State of the United States, as required by federal law.

It cannot be said that the change of the legislative power in Ohio, from a legislature or law-making body, to a legislature or law-making body plus the people of Ohio, could give the new-formed "legislature" greater power over the fate of an amendment to the federal constitution than that conferred upon or held by the Legislature of Ohio when designated the General Assembly alone.

But, whether this be true or not, the mode and method and agency for ascertaing the fact of ratification and proclaiming it and putting the Amendment in force had acted and the fact of ratification had been accomplished before the Referendum petition had been filed.

The political departments of the United States government—the legislative and executive departments—having acted in a matter wholly political and within their exclusive province of determination and action, this court will accept such determination and action as final and conclusive and will content itself and discharge the limit of its authority by ascertaining that the political departments of the government have acted, how they acted,

what their decision is, and in upholding and confirming that action and decision.

This conclusion we believe to be founded in reason and buttressed by authority, and in support of it, we quote at length the opinion of this Court in *Pacific States, etc., Co. v. State of Oregon, supra:*

> Before immediately considering the text of Section 4 of Article 4, in order to uncover and give emphasis to the anomalous and destructive effect upon both the state and national governments, which the adoption of the proposition implies, as illustrated by what we have just said, let us briefly fix the inconceivable expansion of the judicial power and the ruinous destruction of legislative authority in matters purely political which would necessarily be occasioned by giving sanction to the doctrine which underlies and would be necessarily involved in sustaining the proposition contended for.
>
> First. That, however perfect and absolute may be the establishment and dominion of a state government, however complete may be its participation in and enjoyment of all its power and rights as a member of the national government, and however all the departments of that government may recognize such state government, nevertheless, every citizen of such state, or person subject to taxation therein, or owing any duty to the established government, may be heard, for the purpose of defeating the payment of such taxes or avoiding the discharge of such duty, to assail in a court of justice the rightful existence * * * of the state. Sec. (142) ond. As a result, it becomes the duty of the courts of the United States, where such a claim is made, to examine as a justiciable issue the contention as to the illegal existence of a state, and if such contention be thought well founded, to disregard the existence in fact of the state, of its recognition by all of the departments of the Federal Government, and practically award a decree absolving from all obligation to contribute

to the support of, or obey the laws of, such established state government. As a consequence of the existence of such judicial authority, a power in the judiciary must be implied, unless it be that anarchy is to ensue, to build by judicial action upon the ruins of the previously established government of a new one—a right which, by its very terms, also implies the power to control the legislative department of the government of the United States in the recognition of such new government and the admission of representative therefrom, as well as to strip the executive department of that government of its otherwise lawful and discretionary authority. Do the provisions of Section 4, Article 4, bring about these strange, far-reaching, and injurious results? That is to say, do the provisions of that Article obliterate the division between judicial authority and legislative power upon which the Constitution rests? In other words, do they authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to it and thus overthrow the Constitution upon the ground that thereby the guaranty to the states of a government, republican in form, may be secured—a conception which, after all, rests upon the assumption that the states are to be guaranteed a government republican in form by destroying the very existence of a government republican in form in the nation.

We shall not stop to consider the text to point out how absolutely barren it is of support for the contentions sought to be based upon it, since the repugnancy of those contentions * * * to the letter and spirit of that text is so conclusively established by prior decisions of this court as to cause the matter to be absolutely foreclosed.

In view of the importance of the subject, the apparent misapprehension on one side and seeming misconception on the other, suggested by the argument as to the full significance of the previous doctrine, we do not content ourselves with a mere citation of the cases, but state more at length than

we otherwise would the issues and the doctrine expounded in the leading and absolutely controlling case, *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581.

The case came from a circuit court of the United States. It was an action of damages for trespass. The case grew out of what is commonly known as the Dorr Rebellion in Rhode Island, and the conflict which was brought about by the effort of the adherents of that alleged government, sometimes described as "the government established by a voluntary convention," to overthrow the established charter government. The defendants justified on the ground that the acts done by them, charged as a trespass, were done under the authority of the charter government during the prevalence of martial law, and for the purpose of aiding in the suppression of an armed revolt by the supporters of the insurrectionary government. The plaintiffs, on the contrary, asserted the validity of the voluntary government, and denied the legality of the charter government. In the course of the trial, the plaintiffs, to support the contention of the illegality of the charter government and the legality of the voluntary government, "although that government never was able to exercise any authority in the state, nor to command obedience to its law or to its officers," offered certain evidence tending to show that nevertheless it was "the lawful and established government," upon the ground that its powers to govern had been ratified by a large majority of the male people of the state of the age of twenty-one years and upwards, and also by a large * * majority of those who were entitled to vote for general officers cast in favor of a Constitution which was submitted as the result of a voluntarily assembled convention of what was alleged to be the people of the state of Rhode Island. The circuit court rejected this evidence and instructed the jury that, as the charter government was the established state government at the time the trespass occurred, the defendants were justified in acting under the

authority of that government. This court, coming to review this ruling, at the outset pointed out "the novelty and serious nature" of the question which it was called upon to decide. Attention also was at the inception directed to the far-reaching effect and gravity of the consequences which would be produced by sustaining the right of the plaintiff to assail and set side the established government by recovering damages from the defendants for acts done by them under the authority of and for the purpose of sustaining, such established government. On this subject it was said: (P. 38.)

For, if this court is authorized to enter upon this inquiry, as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned—if it had been annulled by the adoption of the opposing government—then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.

Coming to review the question, attention was directed to the fact that the courts of Rhode Island had recognized the complete dominancy, in fact, of the charter government, and had refused to investigate the legality of the * * * voluntary government for the purpose of decreeing the established government to be illegal, on the ground, (p. 39), "that the inquiry proposed to be made belonged to the political power, and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the state, without the aid of oral evidence or the examina-

tion of witnesses, etc." It was further remarked:

This doctrine is clearly and forcibly stated in the opinion of the Supreme Court of the state in the trial of Thomas W. Dorr, who was the governor elected under the opposing Constitution, and headed the armed force which endeavored to maintain its authority.

Reviewing the grounds upon which these doctrins proceeded, their cogency was pointed out and the disastrous effect of any other view was emphasized, from a point of view of the state law, the conclusive effect of the judgments of the courts of Rhode Island was referred to. The court then came to consider the correctness of the principle applied by the Rhode Island courts in the light of Section 4 of Article 4, of the Constitution of the United States. The contention of the plaintiff in error concerning that Article was in substantial effect thus pressed in argument. The ultimate power of sovereignty is in the people; and they, in the nature of things, if the government is a free one, must have a right to change their Constitution. Where, in the ordinary course no other means exists of doing so, that right, of necessity, embraces the power to resort to revolution. As, however, no such right, it was urged, could exist under the Constitution, because of the provision of Section 4 of Article 4, protecting each state on application of the legislature, or of the executive when the legislature cannot be convened, against domestic violence, it followed that the guaranty of a republican government in form * * * was the means provided by the Constitution to secure the people in their right to change their government, and made the question whether such change was rightfully accomplished a judicial question, determinable by the courts of the United States. To make the physical power of the United States available, at the demand of an existing state government, to suppress all resistance to its authority, and yet to afford no method of testing the rightful character of the state government, would be to render people of a particular state hopeless in case

of a wrongful government. It was pointed out in the argument that the decision of the courts of Rhode Island in favor of a charter government illustrated the force of these contentions, since they proceeded solely on the established character of that government, and not upon whether the people had rightfully overthrown it by voluntarily drawing and submitting for approval a new Constitution. It is thus seen that the propositions relied upon in this case were presented for decision in the most complete and most direct way. The court, in disposing of them, while virtually recognizing the cogency of the argument in so far as it emphasized the restraint upon armed resistance to an existing state government, arising from the provision of Section 4 of Article 4, and the resultant necessity for the existence somewhere in the Constitution of a tribunal, upon which the people of a state could rely, to protect them from the wrongful continuance against their will of a government not republican in form, proceeded to inquire whether a tribunal existed and its character. In doing this, it pointed out that, owing to the inherent political character of such a question, its decision was not by the Constitution vested in the judicial department of the government, but was, on the contrary, exclusively committed to the legislative department, by whose action on such subject the judiciary were absolutely controlled. The court said (p. 42):

* * Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a state has treated the subject as political in its nature and placed the power in the hands of that department.

The fourth section of the fourth article of the Constitution of the United States, provides that the United States shall guarantee to every state in the Union a republican form of government and shall protect each of them against invasion; and

on the application of the legislature or of the Executive (when the legislature cannot be convened) against domestic violence.

Under this Article of the Constitution it rests with the Congress to decide what government is the established one in a state. For, as the United States guarantees to each state a republican government, Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet, the right to decide is placed there, and not in the courts.

Pointing out that Congress by the act of February the 28th, 1795, (1 Stat. at L. 424, Chap. 36), had recognized the obligation resting upon it to protect from domestic violence by conferring authority upon the President of the United States, * * * on the application of the legislature of a state or of the governor, to call out the militia of any other state or states to suppress such insurrection, it was suggested that if the question of what was the rightful government within the intendment of Section 4 of Article 4, was a judicial one, the duty to afford protection from invasion and to suppress domestic violence would be also judicial, since those duties were inseparably related to the determination of whether there was a rightful government. If this view were correct, it was intimated, it would follow that the dele-

gation of authority made to the President by the act of 1795 would be void as a usurpation of judicial authority, and hence it would be the duty of the courts, if they differed with the judgment of the President as to the manner of discharging this great responsibility, to interfere and set at nought his action; and the pertinent statement was made. (P. 43): If the judicial power extends so far, the guaranty contained in the Constitution of the United States is a guaranty of anarchy and not of order.

The fundamental doctrines thus so lucidly and cogently announced by the court, speaking through Mr. Chief Justice Taney, in the case which we have thus reviewed, had never been doubted or questioned since, and have afforded the light guiding the orderly development of our constitutional system from the day of the deliverance of that decision up to the present time. We do not stop to cite other cases which indirectly or incidentally refer to the subject, but conclude by directing attention to the statement by the court, speaking through Mr. Chief Justice Fuller, in *Taylor v. Beckham*, 178 U. S. 548, 44 L. Ed. 1187, 20 Sup. Ct. Rep. 890, 1009, where, after disposing of a contention made concerning the 14th Amendment, and coming to consider a proposition which was necessary to be decided concerning the nature and effect of the guaranty of Section 4 of Article 4, it was said, (p. 578):

But, it is said that the 14th Amendment must be * * * read with Section 4 of Article 4, of the Constitution, providing that "the United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the Executive (when the legislature cannot be convened), against domestic violence." It is argued that when the state of Kentucky entered the Union, the people "surrendered their right of forcible revolution in state affairs," and received in lieu thereof a distinct

pledge to the people of the state of the guaranty of a republican form of government, and of protection against invasion and against domestic violence; that the distinguishing feature of that form of government is the right of the people to choose their own officers for governmental administration; that this was denied by the action of the general assembly in this instance; and, in effect, that this court has jurisdiction to enforce that guaranty, albeit the judiciary of Kentucky was unable to do so because of the division of the powers of the government. And, yet, the writ before us was granted under Section 709 of the Revised Statutes, U. S. Comp. Stat. 1901, page 575, to revise the judgment of the state court on the ground that a constitutional right was decided against by that court.

It was long ago settled that the enforcement of this guaranty belonged to the political department. *Luther v. Borden,* 7 How. 1, 12 L. Ed. 581. In that case it was held that the question which of the two opposing governments of Rhode Island namely, the charter government or the government established by a voluntary convention, was a legitimate one, was a question for the determination of the political department; and when that department had decided, the courts were bound to take notice of the decision and follow it.

It is, indeed, a singular misconception of the nature and character of our constitutional system of government to suggest that the settled distinction which the doctrine just stated points out between judicial authority over justiciable controversies and legislative power as to purely political questions tends to destroy the duty of the judiciary in proper cases to enforce the Constitution. The suggestion but results from failing to distinguish between things which are widely different; that is, the legislative duty to determine the political questions involved in deciding whether a state government, republican in form, exists, and the judicial power and ever-present duty whenever it be-

comes necessary in a controversy properly submitted to enforce and uphold the applicable provision of the Constitution as to each and every exercise of governmental power.

Upon the facts and the law set forth, and for the reasons urged in the foregoing brief of argument, the plaintiff in error prays the judgment of the Court below may be reversed and the judgment of this Court entered, declaring the referendum clause of the Ohio Constitution, as it relates to amendments to the Federal Constitution, null and void.

And he now abides the judgment of this honorable Court.

~~For these reasons the referendum provisions in the constitution of Ohio are illegal and void, and the referendum election proposed to be held under them on the action of the legislature in ratifying the pending amendment to the Constitution is without warrant of law and should be enjoined.~~

~~For the reasons set forth and urged in the foregoing brief of argument, the plaintiff in error prays the judgment of the Court below may be reversed.~~

~~And he now abides the judgment of this Honorable Court.~~

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SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1919.

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No. 582.

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George S. Hawke, Plaintiff in Error,

vs.

Harvey C. Smith, Secretary of State of Ohio.

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Error to the Supreme Court of Ohio.

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## BRIEF FOR DEFENDANT IN ERROR.

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This is a writ of error to reverse a judgment of the Supreme Court of Ohio (R. 7), affirming a judgment of the court of appeals of Franklin County, which affirmed a judgment of the court of common pleas of that county. The opinion of the Supreme Court appears at R. 7.

The suit by Hawke, as a citizen and taxpayer, against Smith, as Secretary of State, in the common pleas court, was to enjoin him from discharging the duty imposed on him by sections 1 and 1a of Article II of the Constitution of Ohio, in respect to a resolution designated Senate Joint Resolution No. 4, adopted by

the General Assembly of Ohio, January 7, 1919, and purporting to ratify the amendment to the Constitution of the United States, submitted by the Sixty-fifth Congress, first session, which provided that, "after one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors etc., for beverage purposes is hereby prohibited, etc."

The sections (1 and 1a of Article II) of the Constitution of Ohio, adopted at the general election of November, 1918, under which the Secretary was proposing to act, by submitting to a referendum the action of the General Assembly, are;

> "Be it resolved by the people of the State of Ohio:
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> "The people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.
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> "No such ratification shall go into effect until ninety days after it shall have been adopted by the General Assembly. When a petition signed by six per centum of the electors of the State, as is provided for a referendum petition on laws passed by the General Assembly, shall have been filed with the Secretary of State within ninety days after said ratification by the General Assembly, ordering that such ratification be submitted to the electors of the State for their approval or rejection, the Secretary of State shall submit to the electors of the State

> for their approval or rejection said ratification in the manner provided for the submission by referendum of a law passed by the General Assembly, and said action of the General Assembly ratifying the said amendment to the Constitution of the United States shall not go into effect until and unless approved by a majority of those voting upon the same. All the provisions of this Article on the subject of the referendum upon laws passed by the General Assembly shall apply hereto so far as the same are applicable, except that the General Assembly may not declare its ratification of a proposed amendment to the Constitution of the United States an emergency act not subject to the referendum."

The ground alleged in the petition for the relief prayed was that the referendum, if carried, would be "without effect" because the Constitution of Ohio "is unconstitutional in that it is in conflict with the Constitution of the United States which provides in Article V the manner in which amendments may be made to the Federal Constitution (R. 20).

The opinion of the Supreme Court of Ohio affirming the judgment of the court of appeals is printed at R. 9. It re-affirms the reasoning of the same court in Davis vs. Hildebrant, 94 Oh. St. 154, affirmed here as State of Ohio, ex rel., Davis vs. Hildebrant, 241 U. S. 565. In that case the Supreme Court of Ohio held, as stated in the syllabus, which is the law of the case:

> "The term 'legislature' in Section 4, Article I of the United States Constitution, comprehends

the entire legislative power of the state; and, as so used, includes not only the two branches of the general assembly but the popular will as expressed in the referendum provided for in Section 1 and 1a of Article II. of the Ohio Constitution."

Jones, J., delivering the opinion of the court, said, at 94 Ohio St. 161:

"While Article I, Section 4, of the United States Constitution is controlling upon the states in so far as it grants the legislature of the state authority to prescribe the times, places and manner of holding elections, this is the quantum of the federal grant. The character of the legislature, its composition and its potency as a legislative body are among the powers which are, by Article X. of said Constitution, 'expressly reserved to the states respectively, or to the people.'

"Webster's New International Dictionary defines 'legislature' as follows: 'The body of persons in a state, or politically organized body of people, invested with power to make, alter and repeal laws.'

"The Century Dictionary defines the same term as follows: 'Any body of persons authorized to make laws or rules for the community represented by them.'

**"Under the reserved power committed to the people of the states by the federal constitution, the people, by their state organic law, unhindered by federal check or requirement, may cre-**

**ate any agency as its lawmaking body, or impose on such agency any checks or conditions under which a law may be enacted and become operative.** Acting under this recognized authority, the Ohio Constitution, prior to the adoption of the amendment of 1912, provided that the 'legislative power' of the state should be vested in the general assembly, consisting of a senate and house of representatives. The same provision now exists, but by the adoption of the amendment of 1912, the people expressly limited this legislative power by reserving to themselves the power to reject any law by means of a popular referendum. The lawmaking body, the legislature, as defined by lexicographers, comprehends every agency required for the creation of effective laws. It cannot be claimed that the term 'legislature' necessarily implies a bicameral body. When the term was originally embraced in the Constitution the legislatures of Pennsylvania, Georgia and Vermont consisted of but a single house, with a second body in each, called an executive council. These states later abolished their councils and established a legislature consisting of two branches, and such is the character generally of the various state legislatures today. 1 Bryce's American Commonwealth, page 461, note.

"The constitutional provision relating to the election of congressmen, conferring the power therein defined upon the various state legislatures, should be construed as conferring it upon such bodies as may from time to time assume to exercise legislative power, whether that

power is lodged in a single or two-chambered body, or whether the functions of the latter be curbed by a popular vote or its enactments approved by a referendum vote."

In the present case, the court (R. 11), after commenting on its decision in Davis vs. Hildebrant says:

"In the Hildebrant case the amendment to the state constitution which was adopted in 1912, providing for the referendum generally on legislation by the general assembly, was involved. But in November, 1918, the people adopted an amendment to the state constitution for the express purpose of providing for a referendum on amendments proposed by the congress to the Federal Constitution under Article V.

"The pertinent part of that amendment is as follows: Sections 1 and 1a of Article II. The people also reserve to themselves the legislative power of the referendum on the action of the general assembly ratifying any proposed amendment to the Constitution of the United States.

"It will be observed that it was adopted for the express purpose of allowing the people of the state to participate in the legislative act of ratification of proposed amendments to the Federal Constitution. By this action the people provided for the inclusion of the popular will in the legislative power of ratifying any proposed amendment to the Constitution of the United States.

"The functions conferred in different parts of the Federal Constitution upon the legislatures of the states are manifestly dual in their nature.

For example in the election of United States Senators by the legislatures of the several states, as provided by the Federal Constitution, until the recent amendment, the legislature acted as an electing power. It was not understood to be legislative and in states in which the governor had the veto power over legislation that power did not apply in the matter of electing senators. The legislature represented the state in a manner similar to that in which the electoral college represents it in the choice of president. On the other hand the power conferred upon the legislatures in Section 4 of Article I. of the Federal Constitution, which confers power on the legislature of each state to prescribe the 'times, places and manner of holding elections for Senators and Representatives' is purely legislative, and as already pointed out, in the exercise of that power all the legislative machinery of the state was called into action in the performance of that state legislative duty. It is true, as argued by counsel for plaintiff in error, that under Article V., the state participates in an act which amends the Federal Constitution and in that sense performs a Federal function. But it does not follow that by the word 'legislature' in that section a corpus designatus is meant. It participates in the making of the fundamental law and its act is legislative in character. The making of the constitution is the highest function of legislation. That being so, it follows that in the exercise of this legislative function of ratification, the makers of the Federal Constitution contemplated that all of the agencies provided

by the state for legislation should be empowered to act in accordance with the provisions made by the state at the time the action on the ratification should be taken; and that the word 'legisture' in Article V. is used in that sense."

The Davis vs. Hildebrant cases were commented on in State vs. Howell, Supreme Court of Washington, May 24, 1919, 181 Pac. 920, holding that:

> "Const. U. S. Article V. providing that a proposed amendment shall be valid when ratified by the Legislatures of three-fourths of the several states, or by conventions in three-fourths thereof; does not preclude submission of joint resolution of state Legislature ratifying proposed amendment to a referendum, the words 'legislatures' and 'conventions' not having present-day meanings, the former referring to legislative authority, including all its branches, and not merely the legislature assembly" * * *
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> "Const. U. S. Amend. 10, providing that the powers not delegated to the United States * * are reserved to the states respectively, or to the people; is a declaration that the people of the several states may function their legislative power in their own way, especially in view of the ninth amendment" (Syllabi by Pacific Reporter).

Article V. of the Constitution of the United States is as follows:

> "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose

> Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One Thousand Eight Hundred and Eight, shall in any Manner affect the first and fourth Clauses of the Ninth Section of the First Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

The Constitution of the United States does not require that the states shall have any particular form of legislature. The people of the states have the power to abolish their general assemblies and to take into their own hands all matters of legislation. They have the power to provide that no legislation shall be enacted by the general assembly without being first submitted to the people for approval. And they have the power to do, as they have in fact done, in all referendum states, namely, to provide that all, or any particular class of legislative acts shall stand suspended for a specified time after adjournment of the general assembly, and if, during that time a referendum is duly ordered, that the legislation shall remain suspended and inoperative until the next general election and take effect or not according to the result of the popular vote

thereon. They may also provide, as has been done in two of the states that no legislature or convention shall act upon any proposed amendment to the Constitution of the United States, except a legislature or convention elected after such amendment is submitted. Constitutions: Tennessee 1870, Art. II, Sec. 32; Florida, 1885, Art. XVI, Sec. 19.

The federal constitution confers no power upon the state legislature. It gets all of its power from the people of the state. Such authority as the legislatures have to ratify amendments to the federal constitution is not mandatory but permissive. Congress merely proposes amendments and it is provided that if they shall be ratified by the "legislatures" of a sufficient number of the states, they become part of the federal constitution. Such amendments are submitted to the legislative or lawmaking power of each state whatever its form or constitution, as distinguished from its executive or judicial power. If a state should abolish its general assembly and resort to direct legislation in all instances, it would thereby, according to the argument of counsel, deprive itself of the power to act upon proposed constitutional amendments. If more than one-fourth of the states should adopt that policy there would not remain, according to counsel, three-fourths of the several states capable of ratifying a federal amendment.

But if we assume, for the sake of discussion, that the general assembly of the state must have the final

word in ratifying amendments to the federal constitution in cases where the state ratifies, it must be admitted that it speaks, not for itself, but for the people of the state, and it follows that the people, in their state constitutions, may provide that the action of the general assembly shall be conditional upon popular rejection or approval at the polls.

In such a case the action of the general assembly if approved by referendum, is a ratification by the "legislature." If rejected, there is no ratification by the legislature of that state. No expressed prohibition of such a form of state government is found in the federal constitution and none should be inferred.

We submit that the judgment should be affirmed.

Respectfully,

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## APPENDIX.

The debates quoted by counsel for plaintiff in error in their brief are not debates on Article V. of the Constitution, but on the resolution reported from the Committee of the whole, referring the Constitution to Assemblies to be chosen by the people in the several States, for the ratification thereof; and the amendment of Mr. Ellsworth that it be referred to the Legislatures of the States for ratification. 5 Elliott's Debates, Supp., page 352. There does not appear to have been any debate on Article V.

The history of the ratification of the first ten amendments to the Constitution of the United States, by the several States, shows the use of a variety of forms and designations. They may be found reprinted complete in volumn 2, "Documentary History of the Constitution of the United States, printed by the Department of State from the original records."

By resolution of the Senate and House of Representatives of March 4, 1787, twelve amendments were proposed "to the Legislatures of the several States," as amendments to the Constitution of the United States, all or any of which articles, when ratified by three-fourths of the said Legislatures to be valid to all intents and purposes, etc.

New Jersey, page 325.

The ratification was transmitted to the President of the United States as an "exemplified" copy of a law of the State of New Jersey ratifying certain amendments to the Constitution of the United States. In both the Council Chambers, and the House of Assembly

it was treated as a "Bill," and was passed by both houses. In its title it was designated as, "an Act to ratify on the part of this State certain amendments to the Constitution of the United States." New Jersey adopted all twelve amendments.

Maryland, page 330.

The ratification measure was entitled, "An Act to ratify, etc.," and was transmitted and certified, "An Act passed by the Legislature of the State of Maryland." All twelve amendments were approved.

North Carolina, page 335.

The document transmitted by Governor Alexander Martin to President Washington referred to this as, "An Act of the General Assembly of this State passed at their last session, entitled, 'An Act to ratify the amendments to the Constitution of the United States.'" It recited that it was "Enacted by the General Assembly of the State of North Carolina."

South Carolina, page 340.

The document transmitted by Governor Pickney to the President appeared to be in the form of a resolution, designated as such, which after reciting the Act of Congress, and the proposed amendments, the House of Representatives resolved to adopt the articles and transmitted them to the Senate for their concurrence. The Senate, by a minute on its Journal, concurred with the House of Representatives in the foregoing resolution.

New Hampshire, page 345.

The document transmitted to the President was a certified copy of, "a vote of the Legislature accepting

the amendments to the Constitution, except the second article," and a minute of the Senate as follows:

"In Senate the same day read and concurred."

Delaware, Page 347.

The document transmitted by Governor Clayton to the President recited action by the General Assembly of Delaware as follows:

"Having taken into their consideration the above amendments proposed by Congress to the respective Legislatures of the several States, resolved: that the first article be postponed. Resolved: That the General Assembly do agree to the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Articles; and we do hereby assent to, ratify and confirm the same as part of the Constitution of the United States."

Pennsylvania, page 352.

The ratification by Pennsylvania was by, "An Act declaring the assent by this State to certain amendments to the Constitution of the United States." The Clerk of the General Assembly certified it as, "Enacted into a law at Philadelphia, on Wednesday, the tenth day of March, One Thousand Seven Hundred and ninety."

New York, page 357.

Governor Clinton transmitted to the President, "Exemplification of three Acts of the Legislature of this State." The ratifying measure was enacted by the Senate and Assembly with the usual enacting clause used in the enaction of laws, and contained the approval of Governor Clinton as follows:

"Resolved: That it does not appear improper to the Council that this Bill entitled, 'An Act ratifying certain articles in addition and amendment to the Constitution of the United States of America proposed by the Congress,' should become a law of this State." Geo. Clinton.

Rhode Island, page 363.

Transmitted, "An Act of the General Assembly of the said State ratifying certain Articles, etc."

Pennsylvania, page 367.

The ratifying measure was entitled, "An Act ratifying on behalf of the State of Pennsylvania, only the first of the proposed amendments." It was in form.

Section 1: "Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly, etc."

It was attested by the speaker of the House, and the speaker of the Senate and formally approved by Thomas Mifflin, Governor.

Vermont, page 371.

The ratifying measure was entitled, "An Act ratifying certain Articles," and contained the usual clause, 'It is hereby enacted by the General Assembly of the State of Vermont.' "

Virginia, page 385.

A short resolution of the House of Delegates ratifying the first Article, agreed to by the Senate on November 3, 1791. Thereafter on December 22nd, 1791, separate resolution of the House agreed to by the Senate ratifying the other proposed amendments.

The amendments were ratified by several States, and the facts of ratification communicated to Congress by the President on the various days.

Maryland, January 25, 1790.
New Hampshire, February 15, 1790.
Delaware, March 8, 1790.
Pennsylvania, March 16, 1790.
South Carolina, April 1, 1790.
New York, April 5, 1790.
North Carolina, June 11, 1790.
Rhode Island, June 30, 1790.
New Jersey, August 6, 1790.
Virginia, December, 30, 1790.
Vermont, January 18, 1792.

There is no record of ratification by Massachusetts, Connecticut or Georgia.